Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

—*v.*—

JOSEPH S. PORTASH,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT
OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR CERTIORARI FILED ON APRIL 14, 1978

CERTIORARI GRANTED JUNE 12, 1978

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APPENDIX

1. List of Relevant Docket Entries.

a. State Grand Jury subpoena of defendant Portash's employment record's on October 29, 1974.

b. Defendant Portash's objection to subpoena overruled by the Honorable George Y. Schoch, A.J.S.C., at *in camera* hearing in the Superior Court of New Jersey, Law Division, Mercer County on November 6, 1974.

c. State Grand Jury subpoena for defendant Portash's testimony and grant of immunity on November 14, 1974.

d. State Grand Jury indictment filed on April 24, 1975.

e. Jury trial from January 21, 1976 to February 11, 1976 before the Honorable William E. O'Connor, Jr., J.S.C. in the Superior Court of New Jersey, Criminal Division, Ocean County, resulting in conviction for extortion and acquittal of misconduct in office.

f. Entry of Judgment and imposition of sentence by Judge O'Connor on March 12, 1976 to a suspended sentence to six months confinement, with a fine of $1,000 and one year of probation.

g. Filing of Notice of Appeal to the Superior Court, Appellate Division on April 26, 1976.

h. Judgment reversing conviction and remanding for retrial by Appellate Division on June 29, 1977.

i. Denial of Petition for Certification and Dismissal of Appeal on January 17, 1978 by Supreme Court of New Jersey.

2. The following pleadings, judgments, opinions and orders are printed in the Appendix to the Petition for Certiorari.

Opinion of the Superior Court of New Jersey, Appellate Division 1a

Notice of Petition for Certification 11a

Notice of Appeal to the Supreme Court of New Jersey 13a

Order of the Supreme Court of New Jersey, Denying Certification 15a

Order of the Supreme Court of New Jersey, Dismissing Appeal 16a

Judgment of the Ocean County Court, Law Division 17a

3. Other Relevant Parts of the Record—Transcripts.

(1) *In camera* hearing, Wednesday, November 6, 1974

(2) State Grand Jury hearing November 6, 1974

(3) *In camera* hearing, November 14, 1974

(4) State Grand Jury hearing, November 14, 1974

(5) Statement of Joseph Portash, February 5, 1975

(6) *In camera* hearing, December 15, 1975

(7) Trial, Vol. X, February 5, 1976, pp. 50-133

(8) Trial, Vol. XII, February 9, 1976, pp. 11-15, 49-97

In Camera Hearing of November 6, 1974

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION

THE STATE OF NEW JERSEY,

—v—

JOSEPH S. PORTASH,

Defendant.

Before:

HONORABLE GEORGE Y. SCHOCH, A.J.S.C.

Appearances:

WILLIAM F. HYLAND, ESQ.,
Attorney General for the,
State of New Jersey,
By: ALFRED J. LUCIANI, ESQ.,
Deputy Attorney General.

JAMES T. DOWD, ESQ.,
Attorney for Defendant.

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(2)* The Court: Who is the gentleman in the back?

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* Figures in parentheses refer to each new page of the stenographic transcript.

Mr. Dowd: Your Honor, he's a friend of—my name is James T. Dowd, your Honor. I represent Mr. Joseph Portash, the subject of this Hearing. This gentleman is a friend of his, and he, if we have no objection to his being present—

Mr. Luciani: I have no objection, your Honor.

The Court: All right.

All right. Let the record show that this is an In Camera Hearing. All right. Mr. Luciani?

Mr. Luciani: Your Honor, the State, through me, would like to make application for enforcement of a subpoena to Mr. Portash, Subpoena Duces Tecum issued by the State Grand Jury and served upon Mr. Portash on October 29 at his home in Lakehurst. This subpoena requires production of certain documents prepared, some of them prepared during the course of his employment with the Given Real Estate Insurance Firm, others pertaining to transactions with that firm, and the remainder dealing with his income tax returns.

Mr. Portash is a target of the investigation, however, we feel that the request we've made in this subpoena, do not fall within the Fifth Amendment privilege and, therefore, even though a target would still be subject to production requirements under (3) that subpoena, and specifically we refer first of all to the memoranda requested and prepared pursuant to his employment contract with the Madison Agency and/or Donald Saffron, Incorporated. These memoranda are allegedly site evaluations. We have not seen them, but they were prepared and communicated by Mr. Portash, evidently, to the administrator of the Madison Agency and Donald Saffron, Incorporated, that is Donald Saffron, and used during the course of the normal business transactions, and possibly

even communicated to other persons, clients of the agency. Therefore, we think at this point in time, based upon what we know that these are not private papers, but are papers that were prepared pursuant to an employment contract and given by Mr. Portash pursuant to that contract to incorporation.

In addition, the—

The Court: Has there been a refusal to produce any of these documents?

Mr. Luciani: Mr. Dowd represented to us that Mr. Portash would decline to produce the documents, or to offer any testimony in connection thereto.

The Court: All right. Mr. Dowd, what's your position on this?

Mr. Dowd: May it please the Court, your Honor, (4) I would like to state for the record, and I don't think there's any disagreement on the facts, and if there is so, the Deputy Attorney General may interpose an objection, Joseph Portash, the gentleman who is presently in Court, your Honor, who has been served the subpoena that is before you for the review is an elected official of Manchester Township in Ocean County, New Jersey. He is presently, your Honor, a Freeholder of Ocean County, New Jersey. His term will expire December 31, of this year. The subpoena served on him, your Honor, we have taken the position by way of a stipulation for the purposes of being before your Honor that he would refuse to tender the documents on the basis that they are priviledged because they will incriminate him, possible criminal indictment. Firstly, your Honor, I'd like to say before getting into that, that as the Deputy Attorney General has stated, Mr. Portash is a target, a specific target of an investigation being conducted by Statewide Grand

Jury under the Deputy Attorney General's direction, and I feel, your Honor that because he is a target, his appearance and subpoenaed before that same body, will so pollute the pure well springs of human objectivity in the minds of the 23 or the quorum members of the Grand Jury who are sitting there. (5) I feel that it subjects him to a great degree of prejudice, should an indictment be returned by 12 or more of those persons.

Secondly, your Honor, I feel that the matters are definitely potentially incriminating to Mr. Portash as his attorney, and as an officer of this Court I represent to you for my dialogue discussion of confidentiality with Mr. Portash that he would expose himself to incriminating evidence that could be used against him, or the fruits of that poisonous tree sought out and used against him. Therefore, we respectfully submit that we will not tender the documents over to the Grand Jury pursuant to this subpoena because of their incriminatory nature.

The Court: Mr. Luciani?

Mr. Luciani: Yes, your Honor. As to the first aspect of it, I'm prepared to represent to the Court that the testimony taken could be taken before a different Grand Jury so that there wouldn't be any possibility of pollution because of the identification of these records, but the more vital question is not, whether or not the document are going to be self-incriminating. Really the question boils down to whether or not they're subject to privilege because as, as we all know there are certain documents, for example documents required to be kept by law, corporate records, situations where privilege has been waived, where privilege no longer obtains. And if privilege no longer obtains, or never existed at that, there can be no withholding on the grounds of self-

incrimination. It simply isn't any privilege to withhold that type of material, and that's what I think we have here. This is material that was intentionally prepared pursuant to an employment contract.

The Court: Well, you're talking about Federal Income Tax Returns. What's that got to do with an income employment contract?

Mr. Luciani: Well, we're talking about—the Federal Income Tax Return are a separate consideration. We feel that they are not privileged in the Fifth Amendment sense because they're required to be filed by law, and that takes them out of the privilege. The expense check, not the expense, the expense vouchers, the record of expenses are again supposedly, I would think, prepared pursuant to employment so that his employment obligations could be fulfilled, and he can be reimbursed.

And most important, the most important element on that subpoena, however, and not the bank records (7) again that's a separate question, but the most important element on the subpoena are the materials prepared pursuant to his employment contract. And, you know, again as I said, it seems to me that if no privilege exists, or is waived by communication to third parties, then the State Grand Jury is entitled to have those materials, consider those materials, irrespective of the fact that they may be incriminating.

The Court: You have any authority for that position, Mr. Luciani?

Mr. Luciani: Well, your Honor, it seems to me, again we didn't have a great opportunity to research this particular question because it wasn't until this morning that we found out that Mr. Portash had no intention of producing these documents, but once materials—

The Court: What's the—

Mr. Luciani: The privilege—

The Court: What's the Federal case that, that the accountant—

Mr. Luciani: The recent case, the work papers?

The Court: Well, depends on what you mean by recent. I thought there was a Federal case in the last couple of years where some woman was being (8) investigated and the jury, Grand Jury attempted to get the material from her, and it's my recollection the Court said she didn't have to turn it over.

Mr. Luciani: That's right.

The Court: But then her accountant did.

Mr. Luciani: That's right.

The Court: But doesn't the same thing apply here? This is a—you're asking this man to incriminate himself—

Mr. Luciani: Well, no.

The Court: —in fact, by turning over papers that—

Mr. Luciani: Okay, I think—

The Court: —that are within his possession?

Mr. Luciani: I think it's different in this respect, your Honor, in a situation where you're dealing with the accountant, you're dealing with a man's private papers and you're giving them in confidence to another individual, in confidence, and that's the key. You give him the papers so he can do a service for you as the individual. Here it wasn't like that at all. He was performing his designated task pursuant to an employment contract. He was giving them voluntarily, and not for his use, not for use by the corporation, for his benefit, but (9) by use by the corporation for someone else's benefit, for their client's benefit, knowing full well that the, that the contents of those probably would be revealed to third parties. I consider that, and I believe it to be a waiver, and I think it takes out of the Fifth Amendment privilege. They are not private papers. They're not papers prepared intending that they not be communicated to third parties, quite the contrary. They were prepared so that they would be communicated, and I think that—

The Court: What about that, Mr. Dowd? What about these, the middle part of this list of records that they want? I don't have much trouble with the income tax returns, or the bank statements; they seem like private papers to me. But what about these records?

Mr. Dowd: May it please the Court, your Honor, this is always a very difficult thing to argue, this whole theory because one says why are you not willing to produce these, and the issue, and the issue then about how much can I reveal without incriminating myself in Court. But to answer your question, your Honor, the papers that they have asked for are the private papers of Mr. Portash. They have not asked for him to produce documents of a corporation.

(10) Now, the Deputy Attorney General indicates that what Mr. Portash has in relation to that very sentence, your Honor, are similar to, or exactly that of what they could have gotten from the employer. If they could get it from the employer, your Honor, I would like to direct a rhetorical question, why don't they subpoena them from the third party, the employer?

Now, if there's a reason they have not done that, your Honor, they have deliberately, and purposely sought to have Mr. Portash come down himself and produce this evidence, that in the scope of their examination and investigation could incriminate him personally, then I think that they have no right to do that. The question becomes,

Judge, and this is why I cannot answer you as candidly as I'd like to, I don't mean candid, as knowledgeably, I don't know the entire panoramic scope of the investigation. I have, I am not privy to what the State is actually after. I am highly suspicious or perceptive of what I think they're trying to do. I think they're endeavoring to find evidence, if they have not already gotten it, sufficient to have probable cause to indict Mr. Portash and others for such type of impropriety in getting payments, I assume an allegation of illegal payments through those named (11) employers. I assume this is, I'm just trying to figure what are they after in the indictable potential of my client, and if that's what they're after, your Honor to indict him, I don't mean they're after to indict him, indict him on facts that would justify such an indictment, then I think it's highly improper that Mr. Portash should produce documents in relation to that employment in the center of that subpoena, your Honor, that the State may use or use from the investigatory fruits of those documents, information that could get the gentleman indicted. If it's simply work records, subpoena them from the corporations mentioned therein, Judge. They're not doing that, or if they have done that, I don't know that, Judge.

The Court: Well, could be they've been destroyed, but it doesn't really matter whether they're available through some other source. The question is whether or not Mr. Portash should be obligated to produce them regardless of whether they could be gotten some place else.

Mr. Luciani: Your Honor, may I—

The Court: Well, if—

Mr. Luciani: I'm sorry.

The Court: If he was directed to produce these (12) documents, after he has been advised that he is a target

of the investigation, wouldn't he then be in a position if the indictment, if an indictment is returned against him, based on the production of these documents, wouldn't he be in a position to move to quash that indictment because they're using the fruits of this investigation with him as a target?

Mr. Dowd: I respectfully submit, your Honor, that I think it would be a plenary immunity granted to him if he's forced to submit these documents. I'm, that's my legal conclusion, your Honor.

The Court: Wouldn't that be the effect?

Mr. Luciani: Your Honor, it would only be an immunity of any sort, if in fact these documents were privileged. If our understanding of what these documents purport to be, if it's true, it's as our understanding is that these are site evaluations, I fail to see how they can be incriminating. Now, despite the fact that Mr. Dowd—

The Court: Excuse, me a moment. I don't understand what you mean, site evaluations?

Mr. Luciani: Well—

The Court: Is it s-i-t-e you're talking about, or s-i-g-h-t?

Mr. Luciani: S-i-t-e, your Honor. And in (13) effect what I undertand these documents to be, are an evaluation made by Mr. Portash pursuant to an employment contract with Madison Agency and Donald Saffron, Incorporated judging the property of, judging its suitability for a given purpose.

Now, I fail to see, given the scope of our investigation, given the subject matter of our investigation, how these things could be incriminating, if in fact they are what they are supposed to be. The subject matter of our investigation concerns misconduct in office, bribery and extortion with the possibility of charges in those areas, and

I feel it's highly relevant to determine whether or not Mr. Portash was paid for services actually rendered, or was not paid for services rendered at all. And these documents pertain to the services he rendered to the Madison Agency, a corporation. Now, the reason being that we, we have been unable to locate these records through the Madison Agency because the proprietor of the Madison Agency is no longer within the jurisdiction.

Mr. Dowd: Your Honor, may I address you on that? I think that last part by the Deputy Attorney General really sums up my argument as well as I could have done. I follow his logic, question of probable (14) bribery, extortion, and misconduct in public office. And they don't know, paraphrasing the remarks whether or not his work with the Agency was, or was not sufficient to justify income, if I follow the logic.

Now, they're asking my client to give them evidence from which they will conclude 23 or a quorum of Grand Jurors with the advice and assistance, and analysis of the Deputy Attorney General's office, whether or not these documents justify the receipt of that money, and I'm talking criminally, your Honor, criminally justify. And let's assume they received them, and they conclude that they don't justify it, then they're going to indict him? What they're doing is fishing with the future of my client, via some documents, and I assume some testimony, your Honor. There will have to be some prerequisite to getting these documents from the individual, and the question is really on target that the Deputy Attorney General has stated, they don't know whether it is criminal contact, and they want to look at these documents to find out if there is, not from some corporate source, but from the very target, and a target means the person to whom the poisonous arrow of accusation is

aimed, to give them evidence upon which they may, and I can't say probably 'cause I (15) don't know their facts, but to give, to give the Government evidence upon which they can indict him, and possibly convict him of a crime, Judge.

Mr. Luciani: Your Honor, in all honesty, I find that comparison to be somewhat irrelevant. The point is that anytime a search warrant is issued, even though it may govern a situation where there's private papers, it's incriminating, or it's believed to be incriminating, otherwise it wouldn't be requested. The point is that if in fact these are what they purport to be, or what it's purported they are, I don't see how a mere representation that they are incriminating should satisfy the Court. If they are what they purport to be, they can't be incriminating. It's only when they are not what they purport to be can they be incriminating.

Mr. Dowd: Your Honor—

The Court: Well—

Mr. Dowd: I appear—.

The Court: If—

Mr. Dowd: I don't know how this procedure operates because it's sort of a yes we have no bananas doctrine anyhow that you can't say I, I don't want to show you what I have because it's the gun I held the bank up with. It's a contradiction that (16) on these, but this subpoena, your Honor doesn't say give us any records of Madison Agency, Inc., or Donald Saffron, Inc., the corporate records. It doesn't say that, Judge. It says any records, memoranda, notes, or other documents made in connection with employment.

Now, this includes, your Honor, any of the documents of my client that may never have gone to the, these so-called employers. The Deputy Attorney General has

no way, unless he's the prophet or the son of a prophet, to know what it is in my client's briefcase. There's no possible way, and there is, this habitual reference that everything that's in here is or was in those corporate books or files, and there is no possible way, with due respect to the Deputy Attorney General, there is no possible way he can know about it.

Mr. Luciani: Your Honor, I would like to call just one final thing to your attention, and that is the Public Employees Immunity Statute. I feel, in addition to the subpoena that we have before the bench, it's N.J.S.A. 2A:81-17.2A, Et Seq., it gives a public employee the affirmative obligation to testify before Grand Jury, a Grand Jury. It also gives corresponding immunity automatically and self-executing (17) to anything that results from that testimony.

Now, I fail to see, in light of that, in light of the fact that its, that Mr. Portash is a public employee, and in light of the fact that the investigation surrounds his public employment, how he can claim that he has the right to withhold that information on the grounds of self-incrimination.

The Court: Now, you're finally getting to the nub of it.

Mr. Dowd: Your Honor, may I state our position in relation to that Statute? Firstly, I think it's unconstitutional in that it's—

The Court: Well, that's—

Mr. Dowd: It's a statutory attempt to amend the Federal Constitution, the Fifth Amendment, and the Fourteenth Amendment due process clause which makes us applicable to the, applicable to the State, but be that as it may, your Honor, under 2A:81-17.2A1, it reads that

it shall be the duty of every public employee to appear and testify, matters directly related to the conduct of his office. They took related, which is a very broad term, your Honor, and they put in the adjective directly related. The point there I want to make, Judge, supposing that some (18) of the testimony, and/or documentation sought by the Attorney General in the Statewide Grand Jury is not directly related to his public employment, that Statute, therefore, I respectfully submit, your Honor, or that Statutory coverage, assuming that that Statute is Constitutional, would not be applicable to protect my client and, therefore, I come before this Honorable Court with a two prong fork for protection. One is the Fifth Amendment to the United States Constitution, via the Fourteenth Amendment, which is applicable here, that he not be forced to testify against himself or give incriminating documents.

Secondly, your Honor, that this Statute 2A:81-17.2A may be unconstitutional if it is, I don't know if the protection my client is entitled to, Constitutionally, would protect him here.

Mr. Luciani: Your Honor, I just have a very short statement to make, and that is basically I don't see how anything could be more directly related to the office than allegations made public, that there was either extortion or bribery, and that there was misconduct in office as a result thereof.

Secondly, if in fact the Attorney General goes astray in the Grand Jury, I think there are judicial (19) remedies for that. I think there are, that the objection is untimely made at this time, and I think that the mandate, the public policy mandate contained in 2A:81-17.2A1, establishing the duty of a public employee to testify is overriding in this

case. There's automatic immunity granted from anything testified to, and any fruits derived thereof, and I think in light of that fact, Mr. Portash has absolutely no right to withhold this information from the State Grand Jury.

The Court: You are referring to all four items, or just the two middle items?

Mr. Luciani: The middle items, your Honor. I'm sorry.

The Court: All right. I find that the subpoena, insofar as it relates to Federal Income Tax Returns and bank statements does not have to be honored by Mr. Portash, but I further find that the other documents requested shall be produced by the witness, and I hereby direct him to appear before the Grand Jury and honor the subpoena as it complies to the record of expenses connected to employment by Madison Agency, Inc., and/or Donald Saffron, Inc., and any records or memoranda, notes or other documents made in connection with employment by either or both (20) of those companies.

I think the State, having warned Mr. Portash that he's a target of this investigation, will have to move very carefully to make sure that they do not, thereby give him immunity simply by calling him for these records, that's their problem.

Mr. Luciani: Your Honor one, two final things. Included in your oral order, would there be a requirement that he testify and identify these records?

The Court: You're not asking him to do that.

Mr. Luciani: Well, in order to be presented to the State Grand Jury, someone has to identify the records to them.

The Court: Well, I'll direct him just to identify them, but as to any questions about them, you're not asking him to do that. You'll, you're subpoenaing him for his production of records, and that's all he has to do is identify the records, and that's it.

Mr. Luciani: On final thing, your Honor, is that Mr. Portash, as I understand Mr. Dowd, has represented to me is not feeling well, and I would request the Court to do, take possession of the documents until Grand Jury date could be rescheduled for Mr. Portash.

(21) The Court: What about that, Mr. Dowd?

Mr. Dowd: Well, your Honor, I have no objection to, nor does my client have no objection to the Court taking custody of the documents In Camera until such time as Mr. Portash may appear before the Grand Jury. I suppose in the sense of security, we're seeking an impartial forum so nobody will peak, your Honor, until we dispose of the matter.

The Court: All right. I'll put them—

Mr. Dowd: We may be burdening the Court, but we have no objection.

The Court: All right. I'll put them in my safe with all the wiretap information that I have. It's fireproof, burglar-proof, they tell me.

Mr. Dowd: Your Honor, is your Honor—

The Court: Yes?

Mr. Dowd: May I put on the record my client will not be contemptuous of this Court's directed order, however, in listening to your Honor's statements, and that may be dictum that he's merely to respond to questions, I guess about the possession of the documents only?

The Court: Just as to what they are, I presume. I assume that's what the question is, what is this, what is that, or maybe not even that much.

(22) Mr. Dowd: It's going to create enormous problems of incrimination of my client, and if he does not incriminate himself in some areas, your Honor, he may, by re-

maining silent, vis-a-vis each document, be potentially—I'm naturally seeing all the ghosts in the cemetery, he may be potentially exposing himself to charges of misrepresentation, obstruction of justice, et cetera, maybe qualities about the documents, your Honor, which we want to have some understanding. This is what we have, but we don't represent they're anything with what was in my possession. We don't want to represent their authenticity, their accuracy, their lack of accuracy. Do I make sense, your Honor? And i know I'm talking circuitously, but I must because of the awkward position I'm in in protecting my client's interest, your Honor.

Mr. Luciani: Your Honor, first of all I don't think, in my humble, that that's adequate identification. I think in order for it to be identified, it must be identified as having been prepared, A, B, and C, when and under what circumstances. That's first, but secondly, and I think again the most overriding thing, he is a public employee, and the immunity grant under the Public Employees (23) Immunity Statute insulates him for any testimony he gives under such circumstances. So I can't see what objection, at least at this time—

The Court: It only insulates him as far as the public office is concerned.

Mr. Luciani: No, it insulates him from use of that evidence and fruits of that evidence in a subsequent criminal prosecution.

The Court: Regardless of it, whether the prosecution relates to public office or not?

Mr. Luciani: If I may read 17.2A2 if any public employee testifies before any Court—

The Court: Yes, I realize that. I realize what that says, Mr. Luciani, but let me—

Mr. Luciani: Yes, sir?

The Court: You can't take things out of context. The only reason a public employee would testify would be because of the preceding Statute which makes it the duty of every public employee to appear, and testify upon matters directly related to the conduct of his office.

Mr. Luciani: That's true, your Honor.

The Court: So if he's not a public employee, then he doesn't have any duty to appear and testify as far as one is concerned.

(24) Mr. Luciani: True.

The Court: If he doesn't have any duty to appear and testify, then the immunity—

Mr. Luciani: Well, he does have an obligation to appear and testify as to matters directly pertaining to office, otherwise our—

The Court: That's correct.

Mr. Luciani: It's our understanding that extortion or bribery, although incidental to office, directly pertains to office.

The Court: I'm not quarreling with that statement, but what, it sounded to me like what you're suggesting is that if these documents reveal Mr. Portash's involvement in some crime not related to his office, that he will have immunity from that prosecution for that crime, and I don't think that's the effect of this Statute.

Mr. Luciani: No, I don't think that's—well, I'm not sure. I think it would be in this sense, your Honor. If he were compelled to testify as to matters directly pertaining to his office and coincidentally it was also another crime, I think he would be insulated.

The Court: Well, the record seems to be clear that you are proceeding against Mr. Portash, I shouldn't (25) put it that way, that you are subpoenaing him because of his public office.

Mr. Luciani: That's correct.

The Court: Well, Mr. Dowd, the only thing I could say is we're just going to have to take it one step at a time. I can't make, don't see how I can make any blanket rule now about what Mr. Portash has to answer, and what he doesn't have to answer with respect to the, with the documents. It may well be that you're going to have to do it on a question by question basis, and—

Mr. Dowd: Yes.

The Court: He's asked a question, then he goes outside and tells you what it is, and you make your recommendation about answering or not answering. I don't know how else to handle it. I can't very well say yes, he must do this, and no he doesn't have to do that.

Mr. Dowd: But I, I realize, your Honor it's academically a very difficult situation, but some how I was trying to be creative enough because of what knowledge is within my brain, vis-a-vis the documents, that we want the State, for a Court that there is no representation by Mr. Portash that whatever documents he has pulled from his personal file in (26) compliance with the subpoena under question, no representation by him as to their authenticity, their accuracy, or their lack of accuracy, or lack of authenticity. You know what I'm trying to say, your Honor? We may be asked are these your records, did you bring them, yes, and then say oh, they may find things out that maybe we don't know that are improper, and then their, they could be exposed to a danger of obstruction of justice as one example. And it is in that content that when you go in alone with the documents you're in a jackpot, if explanations should be made if—

The Court: Well—

Mr. Dowd: And if you make explanations, then you'll testify, or incriminate yourself, or a combination of both,

and that's why we're seeking the protection of the immunities afforded us. If the Court orders us to answer, then I think the logical effect of that is totally immune. I'm trying to put it on the record, Judge, because I can see many many dangers.

The Court: Yes, I understand exactly what you're saying, even though I have no idea what's in that folder, but I just, you're just going to have to handle it on an ad hoc basis. I don't know how you (27) can do it any other way. Is there someway you can seal that folder so that there will be no indication that it's looked at by me or anyone, anyone else?

Mr. Dowd: I'm sorry, your Honor?

The Court: I just want to make sure if there's someway you can seal that folder so it would remain sealed until Mr. Portash does pick it up and appear before the Grand Jury.

Mr. Dowd: I guess some—

The Court: Just some scotch tape.

Mr. Dowd: Do you have some?

The Court: I forgot the Clerk's not here.

Mr. Dowd: Shall I go into Chambers here? I think she's got some in her desk here.

(Whereupon, the folder was handed to Judge Schoch and scotch taped by Judge Schoch.)

The Court: That ought to do it. All right. I'll take this, and it will be in my safe. Now, I won't be available the rest of this week. I'm the only one that has the combination of the safe. Is Mr. Portash coming back tomorrow?

Mr. Luciani: He was going to come back Friday, your Honor.

The Court: Friday?

In Camera Hearing of November 6, 1974

Mr. Luciani: We'll arrange it for sometime next (28) week.

Mr. Dowd: Excuse me just a moment, Judge. Your Honor, I was thinking out loud what the Prosecutor, that maybe just for the purpose of today, since you ordered Mr. Portash to introduce, maybe Mr. Portash could tender the documents without any testimony today, then it would be in the custody of the Attorney General.

Mr. Luciani: I certainly don't have any objection to that.

The Court: That's all right.

Mr. Dowd: I think we'll try that way, Judge.

The Court: All right. And I've got an Assignment Judge's meeting 6 o'clock tonight, and till 2 o'clock on Friday down at the Cherry Hill Lodge.

Mr. Luciani: Thank you, your Honor.

The Court: Okay:

(Whereupon, these proceedings were concluded.)

I, WILLIAM J. RICHARDS, JR., a Certified Shorthand Reporter and Notary Public of the State of New Jersey do hereby certify that the foregoing is a true and accurate transcript of my original stenographic notes taken at the time and place hereinbefore set forth.

WILLIAM J. RICHARDS, JR.

Date: 4-7-75

Hearing of November 6, 1974 Before State Grand Jury

STATE GRAND JURY

TRENTON, NEW JERSEY

IN THE MATTER OF:

STATE GRAND JURY INVESTIGATION

Second Floor Conference Room,
State House Annex.

November 6, 1974

Before:

CARL PETERSON, Foreman, and the State Grand Jury.

Appearances:

WILLIAM F. HYLAND,
Attorney General,
By: ALFRED LUCIANI,
Deputy Attorney General.

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(3) JOSEPH S. PORTASH, called as a witness, being first duly sworn, testified as follows:

Examination by Mr. Luciani:

Q. Mr. Portash, you are here pursuant to a subpoena duces tecum, and you have presented documents because Judge Shoch has indicated you must do so; is that correct?

Hearing of November 6, 1974 Before State Grand Jury

A. Yes. I have a statement I would like to read on behalf of that.

Q. Go right ahead.

A. Under order of Judge Shoch I am ordered to appear at this proceeding after his denial of my claim that the information is privileged and may incriminate me. I understand I am a target of an investigation relating to possible criminal conduct in my capacity as Mayor of Manchester Township, and/or of Ocean County.

Q. I am going to ask you to identify material that you produced pursuant to the subpoena. I show you what has been marked as Exhibit 2. Can you identify this, please?

A. File Jacket of Discussion Letters.

Q. Produced by you?

A. File Jacket of Discussion Letters.

Q. This is the material produced pursuant (4) to your subpoena?

A. Yes.

Q. Mark these. I show you what has been marked as Exhibit 3; can you identify that, please?

A. File Jacket of Larson (phonetically) Bank site.

Q. Again, produced by you pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 4. Can you identify this, please?

A. File Jacket Seventy-two Shopping Center.

Q. Again produced by you pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 5. Can you identify that, please?

A. File Jacket of Bank site '69, bank site '69.

Hearing of November 6, 1974 Before State Grand Jury

Q. Again, produced pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 6. Can you identify this, please?

A. File Jacket '72 L.T.

Q. Again produced by you pursuant to the subpoena?

A. Yes.

(5) Q. I show you what has been marked as Exhibit 7. Can you identify this, please?

A. File Jacket '72 Berkley.

Q. Again produced by you pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 8. Can you identify that, please?

A. File Jacket '72 Berkley. Yes. It was produced by me pursuant to the subpoena.

Q. I show you what has been marked as Exhibit 9. Can you identify that, please?

A. File Jacket of Dover Township.

Q. Why was this produced?

A. Why was that produced? It was ordered by Judge Shoch for me to produce it.

Q. I show you what has been marked as Exhibit 10. Can you identify that?

A. Yes. Seventy-two D.T. Cooper.

Q. Was it produced by you pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 11. Can you identify that, please?

A. Seventy-one D.T. Complex, office complex.

(6) Q. Produced pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 12. Can you identify that, please?
A. Yes. Branch Melody Lane, West County Line.
Q. Was it produced pursuant to the subpoena?
A. Yes.
Q. I show you what has been marked as Exhibit 13. Can you identify that, please?
A. Yes. 70 D.T. Bank.
Q. Produced to the subpoena?
A. Yes.
Q. I show you what has been marked as Exhibit 14. Can you identify that, please?
A. '70 Bank site.
Q. Produced pursuant to the subpoena?
A. Yes.
Q. I show you what has been marked as Exhibit 15. Can you identify that, please?
A. Yes. '71 site.
Q. Produced pursuant to the subpoena?
A. Yes.
Q. I show you Exhibit 16. Can you identify that, please?
A. Yes. '72 Tangorb (phonetically) site.
(7) Q. I show you what has been marked as Exhibit 17. Can you identify that, please?
A. Yes. 70 D.T. Office Complex site.
Q. I show you Exhibit 18. Can you identify that, please?
A. Yes. 70 Madison and Tenth, Lakewood.
Q. I show you Exhibit 19. Can you identify that, please?
A. 71 Dover Township Bank Branch.

Q. I show you Exhibit 20. Can you identify that, please?
A. 71 F.T. Bank site.
Q. I show you Exhibit 21. Can you identify that, please?
A. Yes. Administrative Unit Sheets.
Q. I show you Exhibit 22. Can you identify that, please?
A. Yes. Wait Sheets.
Q. I show you Exhibit 23. Can you identify that, please?
A. Yes. 71 M.L. Bank.
Q. All of these files were produced pursuant to the subpoena?
. A. Yes.

Mr. Luciani: Okay. Thank (8) you. No further questions.

(Hearing adjourned.)

(9) Second Floor Conference Room
State House Annex.

November 6, 1974

I, MARIE E. PIOTROWSKI, do hereby certify that I will keep secret those proceedings of the State Grand Jury typed or transcribed by me on request of WAYNE BUONOMO, Certified Shorthand Reporter.

MARIE E. PIOTROWSKI
139 Reed Avenue,
Trenton, New Jersey 08610.

Hearing of November 6, 1974 Before
State Grand Jury

I, WAYNE BUONOMO, do hereby certify that I will truly record the proceedings of the State Grand Jury; and that I shall keep secret the proceedings recorded by me and will only transcribe those proceedings as requested by the Attorney General or upon order of the Court.

I shall only use a typist to type the transcript who has taken a similar oath to keep secret those matters transcribed.

WAYNE BUONOMO
Iron Gate Apartments, DD-6
Beverly, New Jersey

Hearing of November 14, 1974 Before
State Grand Jury

STATE GRAND JURY

TRENTON, NEW JERSEY

IN THE MATTER OF:

STATE GRAND JURY INVESTIGATION

Room No. 440,
State House Annex,
Trenton, New Jersey

November 14, 1974

Before:

OUT OF THE PRESENCE OF THE STATE GRAND JURY.

Appearances:

WILLIAM F. HYLAND, Attorney General,
By: ALFRED J. LUCIANI, ESQ.,
Deputy Attorney General.

DET/SGT. RAYMOND FELDHERR, N.J.S.P.

JAMES T. DOWD, ESQ.,
Representing Joseph S. Portash.

JOSEPH S. PORTASH

Hearing of November 14, 1974 Before State Grand Jury

(2-3) Mr. Luciani: This is a proceeding outside of the Grand Jury Room, in the anteroom, at which Det/Sgt Raymond Feldherr, myself, Deputy Attorney General Alfred J. Luciani, James Dowd, Attorney for Mr. Joseph S. Portash, and Mr. Joseph S. Portash, are present.

We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury.

No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury—a separate Grand Jury from the one Mr. Portash is about to appear before.

Off the record.

(Whereupon an off the record discussion was held between the parties.)

Mr. Luciani: Mr. Portash is here pursuant to a subpoena served upon him last Wednesday, November 6, at which time he was compelled to appear before a State Grand Jury, pursuant to a subpoena and order of Judge Schoch, and to present documents (4) subpoenaed by said State Grand Jury.

Off the record.

(Whereupon an off the record discussion was held between the parties.)

Mr. Luciani: Mr. Dowd, does that comport with your understanding of our agreement?

Mr. Dowd: We are doing this informally because had we gone through the judicial process claiming privilege we would have gotten to the same result.

Hearing of November 14, 1974 Before State Grand Jury

Further, we take the position that my client was immunized when he appeared last week; and that he considers any testimony today to be incriminating; and that he is given immunity, as you stated on the record.

Mr. Luciani: Mr. Portash, do you understand—have you discussed this matter with your attorney?

Mr. Portash: I believe so.

Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?

Mr. Portash: To the best of my knowledge of legal matters, yes.

(5) Mr. Luciani: Are you satisfied with Mr. Dowd's legal representation?

Mr. Portash: Yes.

Mr. Luciani: Okay.

STATE OF NEW JERSEY, }
COUNTY OF OCEAN, } ss.:

(6) I, PEGGY A. MASTRODICASA, do hereby certify that I will keep secret those proceedings of the State Grand Jury typed or transcribed by me on request of Salvatore J. Giaimo, Certified Shorthand Reporter.

PEGGY MASTRODICASA
1465 Cedarhurst Drive
Toms River, New Jersey 08753

Hearing of November 14, 1974 Before
State Grand Jury

I, SALVATORE J. GIAIMO, do herby certify that I will truly record the proceedings of the State Grand Jury and that I shall keep secret the proceedings recorded by me and will only transcribe those proceedings as requested by the Attorney General or upon order of the court.

I shall only use a typist to type the transcript who has taken a similar oath to keep secret the matters transcribed.

SALVATORE J. GIAIMO
47 Old Bridge Drive
Howell Township, New Jersey 07731

Hearing of November 14, 1974 Before State Grand Jury

STATE GRAND JURY

TRENTON, NEW JERSEY

IN THE MATTER OF

STATE GRAND JURY INVESTIGATION.

Room #438,
State House Annex,
Trenton, New Jersey
November 14, 1974

Before:

JON G. SINKWAY, Foreman,
And The State Grand Jury.

Appearances:

WILLIAM F. HYLAND,
Attorney General,
By: ALFRED J. LUCIANI, ESQ.,
Deputy Attorney General.

Hearing of November 14, 1974 Before State Grand Jury

(4) JOSEPH S. PORTASH, being first duly sworn according to law, testified as follows:

Examination by Mr. Luciani:

Q. State your name, please. A. Joseph S. Portash.

Q. And where do you live? A. 200 Wrangle Brook Road, Lakehurst, New Jersey.

Q. Do you know a man by the name of Donald Safran? A. Yes.

Q. Do you know a man by the name of Robert Schmertz? A. Yes.

Q. Were you employed by the Madison Agency in the years 1971 and 1972? A. Yes.

Q. I hand you what has been marked as State Grand Jury Exhibit No. 23.

Can you identify this file, please? A. "71 M.L.D. Bank, West Side of Route 37."

Q. Can you identify the contents of that file, please? A. Yes.

Q. Can you tell us when the contents of that file was put together?

The Witness: When the contents of the file was put together?

(5) Mr. Luciani: Yes.

A. I guess, to the best of my knowledge, it would be after November of 1972.

Can you explain for the Grand Jury why the contents of that file was put in that file in November or after November of 1972? A. I don't follow your—

Q. You indicated that the contents of that file was made up after November of 1972— A. Right.

Hearing of November 14, 1974 Before State Grand Jury

Q. —is that correct? A. Yes.

Q. On the file it says November of 1971. A. Correct.

Q. Is the date on the file incorrect? A. Yes.

Q. Did somebody prompt you to have a file put together and have an inappropriate date marked on the top? A. Yes.

Q. Could you explain to the Grand Jury what it was that caused you to do that? A. The start of an investigation by the State Police or the Statewide Crime Commission, whichever it is.

Q. Why did you—all right. Strike that. Whose idea was it to prepare files in November or after (6) November of 1972 because of the pending investigation? A. I guess, to the best of my knowledge, I would say it was Mr. Safran and myself.

Q. Why? A. Well, actually a lot of the work was done originally and is was done to substantiate the work, itself; and it was felt that without that type of information in the files, that it just would not be correct.

Q. It would not be believable? A. Believable.

Q. Again, I show you State Grand Jury Exhibit No. 23. Could you explain the top evaluation sheet to the Grand Jury? A. It is a planning evaluation sheet used on the parcels of property regarding the utilization factors of that property for any type of usage. It is a very common rating type of sheet that is used and information gathered to determine that.

Q. And where did you get the information to put on that sheet? A. Mr. Safran.

Q. Did he give you—did he give it to you orally or in writing? A. Orally.

Q. Over the telephone or in personal conversation? (7) A. Personal conversation.

Hearing of November 14, 1974 Before State Grand Jury

Q. Where did that conversation take place? A. Once at my home and, I believe, to the best of my knowledge, at his home.

Q. Now, among the files that you presented to me last week, how many were prepared after November of 1972 because of the State Police investigation?

The Witness: How many were prepared?
Mr. Luciani: Yes.

A. All.

Q. Did Mr. Safran prepare—give you the information to prepare all of them given to you by Mr. Safran? A. Yes.

Q. Did anyone assist in the preparation of those files by giving information or advice, other than Mr. Safran? A. No.

Q. Since that time had anybody contacted you concerning accounts of your employment at Madison Agency? A. Yes.

Q. Who? A. At the—I'm trying to—you have to excuse me. I'm trying to figure the right, correct, truthful wording that I could use.

I was called to a meeting and the meeting was in Mr. Giordano's office, a lawyer. I think it was in Middletown (8) Township.

Q. And what was—who was at that meeting? A. At the meeting was Mr. Giordano—

Q. The older or the younger? A. The younger.

—Mr. Halleran, Mr. Safran, Mr. Schmertz, Mr. Steinberg, who I asked to come with me. He didn't have any knowledge; I asked him to be my legal representation at this meeting.

Hearing of November 14, 1974 Before State Grand Jury

Q. And this is Morton Steinberg? A. Yes.

Q. What transpired at this meeting, Mr. Portash? Give us as close an account as is absolutely possible. A. Well, to the best of my knowledge—that's a couple of years back—I was called to this meeting after the investigation had started.

Q. Can you place in time when that meeting took place? A. I believe, the first contact of the initial investigation was sometime in November, around Thanksgiving.

Q. Your contact to you? A. Yes; first contact. I was called to a meeting after that, and I don't have the—

Q. Was it before Christmas? A. I can't answer truthfully; I don't know whether it was before Christmas or not.

(9) I was called to a meeting, and at that meeting the general consensus was: Well, you know, there must be something substantiated by records to justify the compensation that you were given as an employee of the firm.

Q. Why was Mr. Schmertz there? A. You know, I don't—

Q. How did he participate in the conversation? A. Very little. You know, I don't even remember him speaking. He was just there.

Q. Go ahead. Continue. A. And it was stated that some justification would have to be prepared because the initial contact had been made and undoubtedly that the next—wait a minute, now—the initial contact, when it was made, was only for very minor records—something minor of the Madison Agency; and, at that time, Mr. Giordano had, I guess, stated at this meeting that if—that the next course, of course, would be to call you or Mr. Safran in to justify whether your work was there,

Hearing of November 14, 1974 Before State Grand Jury

and that there should be something to justify that work. That's what the meeting was about.

Q. And what, in more detail, was decided upon at that meeting? A. Well, there was no recommendations at that meeting to (10) come out—except that, you know, Mr. Safran and I would have the work justified; and then this was decided upon (indicating) because this was the standard planning technique which I had used many times before. The standard planning technique was my idea, not Mr. Safran or anyone else, to use.

Q. Did anyone at that meeting indicate that the records that you were to prepare should be prepared irrespective of their authenticity?

Mr. Luciani: Do you understand the question?

The Witness: No. I think I would like to ask my attorney about that question, if I may.

Mr. Luciani: Yes.

The Witness: Would you repeat the question?

The Reporter: "Question: Did anyone at that meeting indicate that the records that you were to prepare should be prepared irrespective of their authenticity?"

The Witness: Excuse me?

Mr. Luciani: Yes.

(Whereuopn the witness left the Grand Jury Room.)

Hearing of November 14, 1974 Before State Grand Jury

(11) JOSEPH S. PORTASH, upon returning to the Grand Jury Room, being previously duly sworn according to law, further testified as follows:

Examination by Mr. Luciani:

Q. Do you recall the question? A. Yes, sir.

Q. Would you answer it, please? A. Mr. Giordano and Mr. Halleran.

Q. And what did they say, do you recall? A. You know, its very difficult to recall at this time.

Mr. Luciani: I realize you can't recall the exact conversation.

A. (Continuing) They stated very candidly that if this type of records were not developed, that there would be no justification, and they should be developed in case this went further.

Q. Irrespective of their authenticity? A. Well, they did not, you know, say "irrespective of their authenticity."

Q. What did they say? A. That the records should be prepared.

Q. What records? A. Of employment. Something to state that this money was made by being gainfully employed.

(12) Q. Was it made clear to you that it didn't matter whether you had done the work? A. Yes. I believe—you know, to the best of my ability, I would say, yes.

Q. Who called you to that meeting? A. Mr. Safran, I believe.

Q. And at that meeting you indicated that Mr. Schmertz was present, but did not participate to a large extent? A. That's correct.

Hearing of November 14, 1974 Before State Grand Jury

Q. But he was in the room? A. Yes.

Q. Did Mr. Schmertz know that you were employed by Donald Safran? A. I believe he did.

Q. How do you know? A. Well, you know, we were on the same bank board together. He would mention, you know, "What are you doing?" or something along these lines.

I believe he had knowledge, yes.

Q. Did you ever have any direct conversation with Mr. Schmertz back in 1971 or 1972 concerning your employment with Madison Agency? A. Yes.

Q. Could you outline basically what that conversation entailed? (13) A. Well, you know—

Q. Was it at a board meeting? A. Yes; it was at a board meting. It would be like general conversation. It would be like, you know, "How are you getting along?" and I would stay, "Okay" and this type of thing; "Are you working hard?" or generally like this, and, you know, along these lines.

Q. And how would the Madison Agency name or Donald Safran come into the conversation? A. Well, he would mention the Madison Agency.

Q. There was no question in your mind that he knew you were employed there? A. I would say, there is no question in my mind that he knew I was employed there.

Q. After that original meeting at which the plans were outlined, did you have any discussion with anyone, other than Donald Safran, before March of 1973— A. No.

Q. —concerning this? A. No.

Q. In March of 1973 you had another visit from Det. Feldherr; isn't that correct? A. Yes, sir.

Q. And at that time, Mr. Feldherr took certain letters from your possession— (14) A. Yes, sir.

Hearing of November 14, 1974 Before State Grand Jury

Q. —or copies there? A. Yes, sir.

Q. Were all of these letters prepared on the dates indicated on the letters? A. No. One was a—one was not prepared at that time.

Q. Which one? Can you describe it? A. I believe the one that stated 5,000 pre—if I could see the letter—

Q. I show you what has been marked as State Grand Jury Exhibit No. 17 before another Grand Jury.

Can you identify that, please? A. Yes.

Q. Can you tell us when that particular letter was prepared? A. After the contact by the State.

Q. Can you place it in closer perspective; was it in 1972? A. I wouldn't know. It was after contact by the State.

Q. Do you know who typed it? A. I didn't.

Q. Do you know who did? A. Well, I don't know who typed the letter, but it was sent to me from Safran.

Q. It was sent to you from Safran? A. Yes, or from the Madison Agency.

Q. But you have no knowledge as to who actually typed this (15) particular document? A. I was always under the impression that his wife may have typed the document. I don't know.

Q. You also gave Det. Feldherr a letter of resignation; isn't that correct? A. Yes.

Q. What prompted that letter of resignation? A. I was advised by my attorney, Morton Steinberg, that I should resign, immediately.

Q. Why? A. Well, he stated that as far as—in his opinion, he stated, that there may have been other things that they were involved in that you have no knowledge of whatsoever, and it would probably be best for you to get out and either try to go into your own business or do whatever you want to do.

Hearing of November 14, 1974 Before State Grand Jury

Q. Did you discuss the contents of your resignation letter with Mr. Steinberg? A. Yes.

Q. Were the reasons set forth in the resignation letter true—the true reasons for your resignation?

The Witness: Let me read the resignation letter.
Mr. Luciani: Would you mark this, please.

(State Grand Jury Exhibit No. 1, which (16) consists of a letter dated November 28, 1972, was received and marked for identification.)

Q. I show you what has been marked as State Grand Jury Exhibit No. 1 in this Grand Jury.

Can you identify that, please? A. Yes.

Q. What is it? A. This is a letter that was sent to me, resigning from the firm.

Q. It was sent by you or to you? A. Sent by me to Safran Agency.

Q. Did you read the letter? A. Yes.

Q. Are your reasons stated therein the true reasons why you resigned? A. Yes: all except for the fact that my attorney also advised me to resign because if the State of New Jersey was investigating that firm, that he had heard also some bad reports about the firm, which I had nothing to do with.

Q. What firm are you referring to? A. Madison or Safran Agency.

Q. So, a contributing factor to your resignation was the pending investigation? A. Oh, yes.

Q. Was that a prime factor?

(17) The Witness: To get out of the firm?
Mr. Luciani: Yes.

Hearing of November 14, 1974 Before State Grand Jury

A. I would say, it was a prime factor.

Q. After March of 1973, very little happened until approximately September of 1974, vis a vis this investigation; is that correct? A. Correct.

Q. During that span of a year and six months, did you have any conversations with anyone concerning this matter? A. Yes.

Q. Can you recount them for us? A. Yeah. I talked to Mr. Steinberg about the matter. You know, in general terms, being under investigation, of course, causes a great amount of anxiety, and that was discussed with him as my attorney. I also—

Q. Did you ever discuss again with him the preparation of these files? A. I never discussed that with Mr. Steinberg.

Q. But he was present at the original meeting? A. Yes; but I never—

Q. Did he say anything at that original meeting? A. He was there as my attorney because I felt that maybe I was trying to be used as, you know, a fall guy, and I wanted him to represent me at this particular meeting.

(18) Q. And did he represent you? A. Yes.

Q. What did he say at that meeting? A. Well, he really didn't talk at the meeting, except afterwards.

You know, I really don't know what the gist of the conversation, you know, was, except sort of implying "How could you ever be so stupid as to get involved like this?" and this type of thing.

Q. What did he advise you to do? A. He advised me to be cooperative. If the State or if anyone came to talk to me, he advised to be cooperative.

Q. What did he advise you to do with regard to the files? A. Nothing. You know, didn't say a thing about them, not, you know, in any sense.

Hearing of November 14, 1974 Before State Grand Jury

Q. At the meeting of after the meeting he didn't advise you not to— A. I think what he did was to try to shy away from giving me any advice as far as illegally preparing that type of thing.

Q. Did you ask him directly whether or not you should do it? A. No.

Q. Did Mr. Safran ask Mr. Giordano whether or not it should be done? A. I don't know. I don't have any recollection of that. (19) You see, the major point probably would be—is my lack of actually doing the writing documents because I was so busy being a politician and not having time to do the work, so it is really my—

Q. Did you, in fact, look at every piece of property that is listed in here? A. No.

Q. And, in fact, you didn't have the information to prepare these files? A. Not all of them, no.

Q. Did you do any land site evaluation for Mr. Safran? A. Yes.

Q. Now, let's get back to the conversations you had after March of 1973 with Mr. Steinberg.

Other than indicating to him that you were somewhat apprehensive, what did the conversation entail? A. You know, it's a very difficult thing to remember. This was after when in 1973?

Q. In March—after March of 1973, after you had given the letter to Det. Feldherr. A. You know, I never would really discuss it, except when they would call me; and Mort would give me advice as to what to do regarding if an invetigator had called. He told me to be cooperative, which I was.

When they stole the letter off my—excuse me—yes. (20) When they stole the letter off my desk, which is the letter you have here—the State Police took this without

Hearing of November 14, 1974 Before State Grand Jury

my knowledge and took it off the desk. We wrote them a letter in there asking for a copy of that because they had no right to take that letter off my desk. That was his opinion and we talked about that and—

Q. Did you offer the letter to the detective to see in your office? A. I believe, I did.

Q. You let them read it? A. I let them read the whole file.

Q. Did you also give them other letters at that time? A. I don't know whether it was that time or the time before, but they had other letters.

This one was on the end of the desk; and when I went out of the room, they took it and the detective said he inadverently put it in his file with all the rest of his papers when he left.

Q. Did you discuss the matter, prior to September of 1974, with anyone other than Mr. Steinberg?

The Witness: Did I discuss the matter prior to September of 1974?

A. Yes; I think with Giordano and Schmertz at the bank meeting, you know, I discussed the pending investigation.

Q. Now, I know it is difficult for you to recall the exact (21) conversation, but what we want to do is get the sense of it.

What was the context of the conversation: Did it center around the preparation of the files; did it center around the state of the investigation; did it center around your apprehensiveness; did it center around something else, as best as you can recall? A. You know, it's like—it would be like you would go to a bank meeting and, you know, before you were sitting there having a cup of coffee maybe

either Giordano or Schmertz would say to you, "Things look pretty good. The State Police haven't been back"; you know, this type of thing. This general type of conversation.

There was nothing specific because maybe they didn't want to be specific—I don't know—but it was just a general type of thing.

Q. Who kept them apprised of the state of the investigation? A. I don't know.

Q. Did Mr. Safran ever indicate to you any conversations he had regarding this investigation with Mr. Schmertz? A. No; he never talked to me about anything that he had talked with Schmertz.

Q. In addition to those bank meetings—those bank meetings, did they occur once a month? A. Once a month, sometimes two if there was an emergency (22) meeting.

Q. How well do you know Mr. Schmertz? A. I have known Bob Schmertz since about the early 1960's.

Q. Did you—how did you come to know him? A. I was County Planning Director and knew of him.

He would come to the County Planning Board meetings or I would be speaking throughout the County and he always used to say to me "Why don't you quit government and come into my employ as a planner?" and he offered me jobs in that area; and he was a very successful or is a very successful builder and developer.

Q. And did you, over the years, become friendly with him socially? A. No, not socially. I mean, his plane was a little bit higher than my plane.

Q. But there did come a time when he invited you to become a member of the Board of Directors of the bank: is that correct? A. Bob Schmertz is a very—he is a man that constantly wants to, you know, try to do something

for you. Like, you know, "Here is tickets to the Boston/Celtics basketball game" but I never did go, and, you know, "You can use my airplane whenever you want to" this type of thing.

I never done that. It is just his nature of, you know, (23) of being that way.

When the Freeholder who had held the office died, Robert J. Miller, I was appointed to his place. I guess one month after I took office I was asked by Mr. Schmertz, who made the initial contact for me to go on the bank board, and I told him I didn't want to go on the bank board at that time.

Q. Did you tell him why? A. Well, you know, really because I think it was—I really was not certain as to whether that was a correct thing to do or direction to go at that time.

Q. Didn't it also involve a fairly substantial amount of money, the purchase of an interest in the bank? A. Yes.

Q. Was that a contributing factor to your initial refusal? A. Well, I don't know whether that was a contributing factor as much as—because they, you know—you know, it was stated to me that I could borrow the money, at, you know, a percentage rate which was legal by law, on my signature and purchase the stock.

I don't know whether that was a contributing factor as much as the fact of just being a little bit leary as to what was going on. You know, I didn't know whether that was a correct way to go.

After checking around, I found out that it was permissible (24) by law for a Freeholder to be on a bank board, so I guess I went on in the early 1970's or somewhere around that period; I don't know the exact date.

Q. You are also employed by the bank, are you not? A. Yes.

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Q. What—who got you that job? A. Mr. Schmertz.

Q.What capacity do you hold in the bank? A. I am a bank Director in the Real Estate—

Q. What work do you actually do? A. Well, we used to have an appraisal team, which is quite common in the bank, and you would go out and contribute to the appraisal of property.

Mr. Luciani: Let's continue on with your conversations.

Q. Were there any other conversations prior to September of 1974? A. There probably were, but, you know, I really don't—if I think of any, I would be very happy to tell you, but, you know, there probably were.

Mr. Luciani: Let's talk in terms of specific individuals.

The Witness: Okay.

Q. Did you ever—strike that.

Do you know Herb Kaplan? (25) A. Yes.

Q. How do you know him? A. I met him once—I guess it was a Saturday or Sunday—when I was in the Madison Agency, had coffee with him upstairs, talked with him.

After—I guess that was after, you know, this thing started: the investigation.

Q. Did Mr. Kaplan know that you were an employee of the Madison Agency? A. Yes; I believe he did.

Q. Did Mr. Kaplan, to your knowledge, know that these files were being prepared? A. I don't know. I can't answer that question honestly.

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How about Dave Pinsker? A. Dave was an accountant for the bank, I believe, at one time or was on the bank board for a very short period of time.

Yes; I know Dave Pinsker.

Q. Do you know whether he knew you were employed by Madison Agency? A. I don't know. I never discussed the Madison Agency with Dave Pinsker, but I imagine he did because he knew Bob Schmertz and he was very close to Bob Schmertz.

Mr. Luciani: Let's go onto September of 1974.

(26) The Witness: All right.

Q. Around that time, newspaper accounts began, and prior to actually officially commencing an intensive investigation there was a span of four to six weeks. Can you outline for us who you talked to during that period about this investigation?

The Witness: You mean, during the newspaper—

Mr. Luciani: Prior to the actual commencement of this investigation.

A. Well, I guess it was Mr. Giordano who was extremely upset because I had released the fact publicly that I worked for the Madison Agency.

Q. Did he call you? A. I don't know whether he called or this was at a bank meeting. I really don't know, but the contact was made. I don't know whether it was by phone or in person. I really can't say.

Mr. Luciani: That's okay.

Q. What did he say to you? A. He said to me that I was very foolish and that I should shut up.

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Q. Those were pretty much his words? A. In those—

Q. Did he detail anything more—anymore of an explanation? (27) A. No. He said, "Just shut up. Keep quiet."

Q. Did he say anything about why you should shut up or why you were foolish? A. No—

Q. He thought you would understand— A. —he just said "Shut up. Keep quiet."

Q. —what he was talking about? A. Yes.

Q. Did he say, "How stupid can you be, releasing the fact that you were employed"? A. No. He just used those words, but, you know, when you have—I think, as an individual, if you do something, you know what you have done and what is being referred to.

Q. In addition to Mr. Giordano, did you have any conversations with anyone else prior to the commencement of this investigation?

For example, did you speak to Mr. Safran? A. No, I never have—I haven't been able to talk to him or even see him since sometime in '72 or '73. I don't even know where he was; he disappeared.

Q. Did you speak to Mr. Schmertz? A. Occasionally, yes.

Q. Can you outline for us what conversations you had? A. Well, he would never refer, you know, to the type of thing. It is usually "Would you like to go to a ball game?" (28) or something along those lines.

Q. In terms of the context of the newspaper accounts and your release of the information that you were employed, did you have any conversation with Mr. Schmertz in 1974—in September of 1974? A. At the bank meeting he also told me "You just opened yourself a can of worms by releasing your financial association with the Madison Agency."

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I don't know if those are the exact words, you understand; it is very hard to know the exact words.

Q. But there is no question in your mind that is the sense and the meaning? A. Yes.

Q. In addition to those conversations you just outlined with Mr. Schmertz and Mr. Giordano, around the same period of time, but prior to my beginning my investigation, do you recall any other conversations that you had? A. I may have discussed this with my attorney, Morton Steinberg, until I changed and got Mr. Dowd. I may have discussed it with him, yes.

Q. At the time you discussed it with Mr. Steinberg, did you discuss the files? A. No. He consistently told me that if I was contacted to tell the truth and be very open about it.

Q. Tell the truth and be very open about it? (29) A. Yes.

Q. But he never told you not to prepare the files? A. About the files no. The preparation of the files—of that document was my idea.

Q. Of all these files? A. Yes; the preparation of that document. No one told me.

Q. The specific document? A. Yes.

Q. But the idea to create work records was whose idea? A. It came out of that general meeting over there.

Q. Was it Mr. Giordano's idea? A. It was either Mr. Giordano or Mr. Halleran. Either one.

Q. You thought of what would be the best records? A. That's correct.

Q. When I began my investigation, you had several conversations with many people pertaining to this conversation; isn't that correct? A. Sure.

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Q. For example, you discussed the matter with Seymour Kagan? A. Yes.

Q. And at that time you indicated to him that you would like to speak with me? A. Yes.

Q. Did you have any conversation with Mr. Giordano? A. No.

(30) Q. Not since this investigation began? A. The last conversation that I have had with Mr. Giordano was at the October board meeting—that was the last time—and the conversation was with Mr. Giordano and Mr. Schmertz, which they both told me, at that time, "Your chances of being indicted are very good. You are going to be indicted." That was, in essence, what they said.

Q. Did they indicate to you any concern about the preparation of work records and— A. No.

Q. Their involvement? A. No.

Q. And since that time—since that October meeting, you have had no conversation with Mr. Schmertz? A. No.

Q. Prior to that, did you have any conversation with Mr. Schmertz? A. Just at the bank meeting or, you know, by telephone or—you know, I really don't know. I probably had talked to him, but you know, I—it's very hard to remember exactly what—you know, how—

Q. Not "exactly what", but, generally, did you discuss the investigation and how it pertained to you and possibly him and Mr. Giordano and Mr. Safran? (31) A. No; I never discussed the investigation—you know, how it pertained to Mr. Schmertz; in that area—because I don't know whether, you know, Mr. Schmertz even knew what was happening.

Q. He was at the meeting; wasn't he? A. Yes.

Q. That's the meeting with Giodano back in 1972? A. Yes. It seemed that he, after that, became very, you

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know—you know, I guess, once the investigation started, he became very cool, whereas there used to be a tremendous amount of contact and phone calls. This immediately stopped.

Q. It immediately stopped? A. Yes.

Q. And did you speak with anyone out of the Giordano firm concerning this investigation? A. Well, I spoke with Sy Kagan pertaining—

Q. That's a different law firm? A. Yes.

Q. Did you speak with anyone in Giordano's firm? A. No.

Q. In your conversations with Mr. Kagan, did you indicate to him, in any way, that your work records were, in any way, not authentic? A. No. No; I just didn't talk to Mr. Kagan about anything with (32) work records.

Mr. Kagan and I were very close because of his being Solicitor for the Utilities Authority, and his law partner is County Counsel.

Q. Did you speak to anyone at Leisure Technology: Mr. Peter Davis, Justin Segal? A. No, not about this. I spoke with Justin Segal many times when he was before the Township in meeting with the Township. I knew Justin Segal.

Peter Davis, I know of, but not that well.

Q. Did you speak to anyone at all at Leisure Technology concerning this investigation? A. No.

Q. Did you speak to Mr. Kaplan concerning this investigation? A. Yes. Mr. Kaplan came over my—he called me up and he stated that I have the original copies of these records—those documents.

Q. Mr. Kaplan said this? A. Mr. Kaplan. He said one of the items that was in the newspapers is not true. He said "You didn't do the evaluations on that, so you should go back to the newspapers."

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I said, "Look, I am not going back to any newspapers and say anything."

He said, "Well, I'll be over to see you."

(33) He came over to my house. He had the originals of those records in the back of the trunk, and he stated to me what did I want to do with them.

He said, "Do you want me to burn them, get rid of them?" and I said, "I don't want to know anything about those records. I have my copies of those records. They are not mine. They belong to the corporation. I don't want the records."

Q. And that was it? A. And that was it; and I have no knowledge of where his records are or where the other records are.

Those are the duplicate copies that I had when you subpoenaed—

Q. Did Mr. Kaplan indicate that he knew that these were not authentic? A. No, he didn't. He just indicated, I believe, that Safran gave them to him and he had possession of them. That's all.

Q. Did you actually see them? A. Yes. He showed me one of the copies on the Standard Roofing, which was my handwriting.

Q. That's the Tamber property? A. Yes; which was the original.

Q. And did you have any discussion with regard to the Tamber property? (34) A. Yes. He told me that the site that I evaluated was actually next to it because the newspaper had stated they thought it was a conflict: my evaluating the site and then approving at the County Planning Board.

"You didn't really evaluate the site; that was sold

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after that," he told me, "so you actually had no dealings with that particular site."

I told him that was very nice, however it would be very foolish for me to go back to the newspapers and try to explain this.

The Witness: You can understand that, I guess.
Mr. Luciani: I can understand the predicament.
The Witness: Okay.

Q. Did you have any subsequent conversations with Mr. Kaplan? A. No. He—he called one—I don't know whether he called me. He called Anne, one of the ladies that worked there, and told—

Q. Ann Rhoades? A. Yes.

—and told her that he remembers me coming in on Saturday for coffee and stopping at the Madison Agency.

Q. Is that, in fact, true? (35) A. Yes; I did go in there on some Saturdays.

Q. Why did he call Ann Rhoades; do you know? A. I don't know. You know, Annie is a very excitable lady, and she has been a very good friend of mine over the years and was very close, and I guess she didn't want to see them picking on me and, you know, this type of thing. She was very close. I don't know what the situation was.

Q. Did you have any conversation with Ann Rhoades concerning this investigation? A. Annie would constantly call me on the phone and I would tell Annie one very simple statement on the phone: "Annie, tell the truth at all times"; and that is what I stuck with with Annie.

Q. And you said you had had no conversations with Mr. Safran, at all? A. No, not for a long time. I don't know the exact date, but not for a long time. He has moved out.

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Q. Okay. Now, without necessitating going through each and every file and each and every piece of paper, can you tell us, first, how long it took to put all of those files together? A. A few days, I guess. A few days.

Q. And during— A. I had a tremendous knowledge of the properties involved because I know the properties and know of them and, you (36) know, had visited the properties, so I had knowledge of them.

Q. During the course of those few days, you and Mr. Safran had several communications? A. Yes.

Q. Did you, at any time, sit down together and work— A. Yes.

Q. —you having the white pad and he having the yellow pad? A. Yes.

Q. Where did you get the—I show you what is marked as State Grand Jury Exhibit No. 20. A. He supplied them to me.

Q. This will sound like a strange question, but did you have any conversation concerning the use of pencils and pen and different forms of paper? A. Yes.

Q. Can you outline that for the Grand Jury, please? A. You know, I really don't know the exact form of the conversation, but it would be like which was easier to trace or how could you know whether this was a year old or two years old or something along those lines, and it was decided upon to use pencil.

Q. Mostly pencil? A. Yes.

Q. Did you ever, prior to this time, receive anything in the (37) mail from Mr. Safran that wasn't typewritten? A. You know, I don't know. I may have received some hand notes in the mail from him, yes. I really don't know. I can't answer that question honestly.

Q. Do you know Jesse Vertun? A. I know of him.

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Q. You haven't any conversations with him? A. No.

Q. Has anybody told you that stories to "support" your version of the story were being prepared? A. No.

Q. Did you have any conversations with anyone, other than the people you have outlined, concerning this case? A. Just my immediate family. My wife.

Q. And, of course, you discussed it with your attorney, and we are not interested in that. A. Yes.

Mr. Luciani: Would you step down, please.

The Witness: Surely.

(Whereupon the witness left the Grand Jury Room.)

Statement of Joseph S. Portash Taken on February 5, 1975

MONMOUTH COUNTY COURT HOUSE
FREEHOLD, NEW JERSEY

Wednesday, February 5, 1975

STATEMENT OF:

JOSEPH S. PORTASH,

Taken by:

ALFRED J. LUCIANI, ESQ.,
Deputy Attorney General

In the Presence of:

JAMES T. DOWD, ESQ.,
Attorney for Joseph S. Portash

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(2) WEDNESDAY, FEBRUARY 5, 1975

(The statement is commenced at 4:11 p.m.)

JOSEPH S. PORTASH, sworn.

By Mr. Luciani:

Q. Mr. Portash, I call your attention to April of 1971. Would you indicate for us how you first became associated with Madison Agency? A. I was approached by Donald Safran to try to engage me to work as a Planning Consultant, Site Evaluation Consultant for the Firm of the Madison Agency in Lakewood.

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Q. Did you accept his first offer? A. No, No. I—I was asked a couple of times within a period of two weeks and probably accepted either the third or fourth week after he had talked to me initially.

Q. What was the nature of his offer? A. His offer originally was $300 per week and the offer consisted of site evaluations, zoning evaluations, land evaluations.

Q. Did you seek any advice before accepting the position? A. Yes. I contacted Morton C. Steinberg initially and asked Morton C. Steinberg if there would be any problems in that position. Morton C. Steinberg intially told me, I (3) believe even by letter the first time, that as long as I didn't engage in any employment of any project in the Township or in the County it would not be a problem. The second time that he spoke with me Morton C. Steinberg, he amended that and stated that, "Well, based upon your position it would only apply to work of that Agency directly in the Township. So as long as you didn't do work in the Township you could do it in the County."

Q. All right. When you accepted the position did you accept it in good faith expecting to actually work for an earned living? A. Yes. I was very—I was very happy about getting the position. I wanted the position and needed the money.

Q. Did you expect to work for the money? A. Yes.

Q. Did you know at that time when you originally accepted the offer that Mr. Schmertz had an interest in Madison Agency? A. No, not initially. I didn't know until about two weeks later.

Mr. Dowd: Off the record.

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(A discussion takes place between Mr. Luciani and Mr. Dowd which is off the record.)

Q. At the time of your original negotiations with Mr. Safran in connection with this consultant's job, did you (4) plan a vacation home? A. Yes.

Q. Would you explain that please? A. I was in the process of building a vacation home in Maine and at the time I took the job I told him that I really needed the money and would use that to build the vacation home in Maine.

Q. Did you inform Mr. Safran that you would have to borrow money to build? A. Yes, yes, I did. I also—I borrowed money from the—at that time it was the Lakewood Trust Company. It is now the First National State Bank. I also sold a parcel of property that my wife had owned since 1951 in Harvey Cedars. That along with an advance in salary I paid for the home.

Q. When you indicated to Mr. Safran that you intended to build a vacation home did you also indicate that you expected to borrow additional monies to construct it? A. Yes.

Q. Did he offer an alternative? A. Yes. He said, "Before you—before you borrow any money let me see if I can't work out an advance in salary."

Q. Was the idea of the advance his or yours? A. His.

Q. Are you certain of that? A. Yes.

(5) Q. He said, "Let me see if I could work out an advance"? A. "Let me see if I can work out an advance in salary." And he said, "I will be back in touch with you in a week or so."

I waited. He then got back to me after a week or so and stated to me that, "I can work it out, but I have got

Statement of Joseph S. Portash Taken on February 5, 1975

to give you—I have got to give you the checks out of another Company."

Q. Checks for the advance this is? A. Yeah, the checks for the advance. I stated that I couldn't do that.

Q. Did he mention the amount of the advance first? A. I don't know whether—you know, I was talking in terms of about $15,000 because I had mentioned to him what I was short, $15,000, of going for a mortgage and, um, that's how it was. Wait a minute. He stated to me, "Oh, rather than go for the mortgage maybe I can work out an advance in salary." That was the exact wording that he used.

Q. Was he certain he could work out an advance? A. No. He said—he said, "I'll see if I can work out the advance in salary.

Q. And how long after that did he come back to you? A. About two weeks.

Q. And what was the arrangement, if any, that he (6) arrived at? A. Well, he said he could work out an advance in salary. However, the checks would come from another Company that he was affiliated with.

Q. Did he say the name of the Company? A. No, he didn't. I told him that I just couldn't accept any checks from another Company. I think that would, you know—at that time I said to him, I said—I really don't know the exact words I said to him, but in by heart I felt, you know, that that was—it wasn't a thing that I wanted to do.

Q. Did he immediately say, "Well, okay, we can work it out"? A. No.

Q. What did he do? A. No, no. He said then that, "Well, look, I have got to see whether I can work that type of an advance on your 1900"—I guess it was the 1973

salary. "Give me some time. I have got to see whether I can work it out and can afford it in my Company."

Q. Did he ultimately come back? A. Yes, he did.

Q. What did he say? A. He said, "I can work it out. I have had some good success in the last couple weeks. We sold some properties. (7) I have got some money coming in, some money owed to me and I can work it out."

And I said, "Gee, that would really be great and you'd help me out of a jam."

Q. You began work about July 1st, 1971? A. Yeah. I think I was going away then for the 4th of July weekend for a week or so or two weeks and, I don't know, in that period. But then I started about three weeks to a month after that and the first couple of months I did work. I got valuations. I was going along and, then, ugh, it stopped.

Q. Suddenly? A. Pretty abruptly, yes.

Q. Were there any explanations? A. Well, he started to say about—well, I started to say to him about the political season, you know, and I started getting in—I think I was running for Freeholder at that time in 1900—1971 or I was involved in somebody else's election. I guess I was running. Let's see. '71.

Q. Did he suggest that you should sever your employment with him because of your time pressures? A. No, no, no. We had talked. He said, "Look, I can carry you for a few months, you know, while you are busy, engaged in politics and during the Christmas holidays and no problem at all and when you get back you can make it up." He (8) said, "You know, your value is worth it."

Q. I call your attention to January of 1972. Did you begin work for Madison Agency? A. No. I called there numerous times through my secretary at the County—she can verify the calls—and, um, tried to set up meetings with him and lunches regarding some additional work and he was very busy at that time. And he said, "Look, um, I'm very busy. I'm out. I really have nothing. As soon as I get something in I will give it to you. Just hold tight for a while. And, look, you are a consultatnt. Just stay tight. When I need you I will call you."

Q. Did you begin to develop a feeling about your relationship with Madison Agency? A. Yes, I did. I discussed with—also with my wife and we had started to discuss this and my wife kept saying to me, "There should be some work being done for this money and that you should constantly call him and get some work, because if there is no work being done for this it is not a good situation."

Q. What did she say? Did she use a phrase in describing it? A. She said, "You are not earning the money."

Q. Did she mention the fact that you were being used? A. I don't—I don't know whether she mentioned—I—um—I guess you have the impression, you know. I can't (9) say honestly whether she said, "You are being used." She just kept saying to me, "It is your responsibility and your obligation to go there and get this work and do it. That is your responsibility and your obligation, or else you are going to get in difficulty."

Q. And this is three, four, five months after the work suddenly stopped? A. Yes.

Q. And this is about the time that Leisure Technology introduced an application for utility franchises? A. Yes.

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Q. During the course of the negotiations with the Utilities Authority, which you were a member of, and Leisure Technology did the original application run into any difficulty? A. Yes. I guess it was in 1970 or '71 early that they had—by "they" I mean Leisure Village had met with the Township Governing Body requesting that they were coming into the Township to develop in Manchester Township. They at that time asked along with other things—they asked of course for a condominium ordinance because they were developing according to condominium law which the State of New Jersey had adopted. They asked for a franchise for sewerage. At that meeting and subsequent public meetings the Township of Manchester, all Township Committeemen agreed to give Leisure Village a franchise for public water and public sewerage.

(10) Q. Okay. For the sake of expedieney, the Utilities Authority was established some time after that? A. Yes.

Q. And their regulations precluded the issuance of such franchises? A. That's correct.

Q. Now, during the course of the negotiations between Leisure Technology and the Utilities Commission was there a meeting at which the representatives from Leisure Technology requested compliance with the original position of the Township? A. Yes. They requested a meeting, an accommodation meeting with the Township Governing Body, with the Utilities Authority and all attorneys and they stated at this meeting that Manchester Township was not backing down on its original agreement. They threatened to take us to Court. They publicly asked me in front of this—

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Q. You specifically? A. Yes. As spokesman I am Mayor for the Township. Asked me whether the Township had committed a commitment of a franchise. I said, "Yes, we had committed a commitment of a franchise; however, the lawyer, after the Utilities Authority was created, had told us it was impossible to give the franchise from the Municipal Utilities Authority because it was impossible."

Q. The legal reason isn't important at this point in (11) time. A. All right.

Q. During the course of that meeting who was it that called upon you to state publicly the prior commitment? A. I think it was—it was either Mr. Halleran or Mr. Schmertz. I don't know which one. I think it was Mr. Halleran.

Q. And what was your feeling when you were asked to do this? A. Well, I felt, you know, it was a very awkward postition to be in. However, the agreement was public. We had nothing to hide about the agreement and I publicly stated that, yes, the Township Governing Body had publicly agreed to issue Leisure Village a franchise if Leisure Village would move into our community and I stated that publicly and henceforth put it out into the newspapers and announced it at a public Township meeting that, yes, the Township did have an agreement; we were going to be threatened with a law suit because the Township did back off on that agreement.

Q. Sometime after that meeting did you meet Mr. Giordano and Mr. Schmertz at a bank board meeting? A. Yes.

Q. Would you explain that encounter? A. I think it was after one of the bank board meetings they were very,

um, adamant about the fact that the Township (12) had gone back on their word on the Leisure Village Corporation; that they had a sizeable investment in the Township and they predicated that investment on a good will agreement by the Township of Manchester.

Q. What did they say about you? A. They said—me? "You had stated that publicly that that franchise was committed and, ugh, we want that franchise issued by the Municipal Utilities Authority."

I stated that I—I couldn't do that.

Q. Did they say anything about your ability to control your own Town? A. They stated that, "Evidently you can't, you know, control your own Town."

And I said, "There is nothing that I can do in that area. It's against the law."

Q. Did they say anything about you putting them in a bad position? A. Yes. They said they had invested a considerable amount of money in the Township and that it was a very awkward position for them to be in.

Q. About that point in time did you correlate in your own mind your employment at Madison Agency and the lack of work thereat and this application then pending before the Utilities Authority? A. I felt, yes, there was—you know, I just felt— (13) I don't know how to describe it.

I just had a very awkward feeling that, you know, that maybe I was being used.

Q. Did you react by again calling Mr. Safran and requesting work? A. Yes. I called him for the next few days. I don't know whether I got through or not. He was out of Town. I got—once I got through he was out in his airplane some place. I left messages each day and then he finally came back. I met with him on the—I guess

it was somewheres around Lakewood on the corner of Route 9 and Route 70 and told him the urgency of having additional work. He assured me that the work was coming and that he was very busy at this particular time.

Q. Would you say that he placated you? A. Yes, he did. I was satisfied with his answer at that time.

Q. Sometime around August of 1972 representatives of Leisure Technology suggested an alternatives to the actual award of the franchise and, in short, it was simply that the Utility Authority take no position and allow Leisure Technology to apply to the PUC? A. That wasn't the first alternative. The first alternative was the suggestion that they were going to turn this over to the residents of Leisure Village and have a public (14) corporation of the residents.

Q. Was that rejected? A. No. That was treated very favorable. However, I think the lawyer stated that that was impossible to do.

Q. Okay. A. Although there was a bill pending in the Legislature by a Senator to do this at that time.

Q. And the second alternative was? A. The second alternative was to, ugh, rather than institute an immediate law suit by Leisure Village versus the Township of Manchester and the Utilities Authority, to allow Leisure Village to go to the PUC and ask the PUC to issue the franchise and have the municipality neither reject nor affirm the application before the PUC.

Q. Okay. Now, again referring to your personal situation as opposed to your official position as Mayor of Manchester and the fact that there had been that prior representation by the Township Committee, what was your feeling about that suggestion? A. As far as my personal situation?

Q. Yes. A. Well, my personal situation I guess was relief, because it—you know, it took me out of a very awkward—really an awkward position of having—

Q. What was the awkward position? (15) A. Well, of having promised and then not living up to the promise by the Township was the awkward position. But also, you know—I—I don't know what—it was like feeling that you were obligated and then, you know, you just couldn't do it.

Q. Obligated to whom? A. Obligated to the corporation.

Q. Why? A. Because of the employment with Madison Agency.

Q. Now, can you say that your decision to support that resolution of non-opposition was in any way influenced by the awkward position, as you characterized it? A. I believe in the awarding of that franchise to Leisure Village. I believed that as an individual that the Township owed that franchise to Leisure Village and when I voted on that I voted with that belief, that the Township owed that franchise to Leisure Village by commitment.

Of course, it relieved my personal situation, but that wasn't the prime—you know, the prime thing.

Q. But it was a contributing factor? A. But it was a contributing factor.

Q. Would you characterize it as a solution that got you out of the middle? A. Well, alleviated the solution, right. It got me out of the middle, yes.

(16) Q. Sometime after that the original investigation began. Did Mr. Safran ever make contact with you immediately after that original investigation began? A. Yes, yes. Are you referring to the meeting?

Q. Yeah. A. At the lawyers'?

Q. Describe the conversation and how it came to pass that a meeting occurred. A. Well, he called me. He called me on the 'phone and said that he had arranged a meeting over in the, um, Middletown Law Offices of Giordano and Halleran, would I please come alone.

Q. Did he say, "would you please come alone"? A. Yes, he did.

Q. Or was it more like an order? A. No. He said would I please come alone and he offered to pick me up in his car. I said, no, I'd rather drive over there and, um, I did not say to him that I was going to seek Counsel.

I then called up my lifelong friend, Solicitor Morton C. Steinberg and I asked to go over to see Morton and I explained what the situation to Morton was and I asked—

Q. At that time did you tell Morton that you did perform work? A. No, no. I hadn't told Morton anything. And I (17) asked Morton to come over with me and just to protect my interests.

Q. Why did you seek Mr. Steinberg's company? A. I trusted Mr. Steinberg and felt that going in there without the benefit of someone there on my side would have been very, very foolish.

Q. Why? A. I started to think that this thing could develop where, you know, that maybe I was going to be left like holding the bag or something and that is when I sought his advice.

Q. Did your past experience by virtue of your employment in the Madison Agency contribute to that belief? A. Surely.

Q. Did you believe at that point in time that you were duped into entering into this agreement, the employment agreement? A. I don't know whether I believed I was

duped into it or I started to say to myself that I really wanted to make extra money and I just falsely maybe said to myself, "Well, here is a good way to make extra money legitimately and honestly, and, you know, thinking, knowing I was wrong but think I was right.

Q. That's when you first began? A. Yes.

Q. Okay. At the meeting in Middletown did anybody (18) say anything to you when you arrived with Mr. Steinberg about the fact that you arrived with Mr. Steinberg? A. No. No, it was not mentioned.

Q. When you arrived did the meeting begin immediately? A. No. We had to wait a considerable length of time out in the anteroom.

Q. How long? A. Fifteen, twenty, twenty five minutes.

Q. During the time you waited were you and Mr. Steinberg accompanied by anyone? A. I think Mr. Giordano's secretary or somebody come out and said, "You will be a short time," and that's it. We weren't accompanied by anybody.

Q. Did anybody come in after you? A. No.

Q. When you went into the— A. Through that door. That was the front door. I don't know whether—

Q. When you went into the meeting room who was there? A. Oh, Mr. Giordano, Mr. Halleran, Mr. Schmertz, Mr. Safran.

Q. Who began the discussion? A. Mr. Safran.

Q. And what did he do? Did he summarize the situation? A. He went into the employment thing of what I was (19) making, the salary, what amount of work was done for it.

Q. Did he specify in plain and simple language that you had not done ninety percent of the work? A. Yes.

Q. That in fact the work that was involved couldn't justify— A. Well, he stated that he was very busy and we just neglected, you know, to get around to this and that he has been out of town quite a bit and Mr. Portash was involved in the election; and just through this type of commitment by both of us a great amount of this work was not done.

Q. Did he offer any explanation at that time for the staggered salary payments in the year of 1972? A. No, no.

Q. What was said in response to his description of the work that you had done in relation to the money that you earned? A. Well, I think what come out of it was I think Mr. Giordano had said that—this—I'm trying to use his exact words or trying to use some of that—"This looks very bad. There was not substantial work done for that particular amount of payment and there should be statistical records of the work for this payment."

Q. But that was after Mr. Safran said that you hadn't done— (20) A. Yes.

Q. What? A. Hadn't done the majority of the work because we were busy.

Now, you know, I don't want to be held down to the exact wording of that statement. You know, that's what the meaning was. I don't know if those are the exact words or not, but that was the meaning.

Q. Whose meaning, Safran's or Giordano's? A. No. Giordano's.

Q. What was the meaning to you? What was the message? A. The meaning was that the work was not there in the files; that was the meaning.

Q. And what was the instruction or the counseling? A. There should be work records in those files substantiating the employment.

Q. At the time he said to substantiate the employment he well knew that you hadn't done sufficient work in reality to justify the salary? A. I brought up the fact of the planning records that I had and stated that I would reconstruct the—reconstruct the record on the planning records.

Q. During the course of that meeting when you were discussing the type of jobs and what type of papers would be included in those records, did Mr. Safran indicate what jobs (21) would be— A. No. The type of jobs and the papers were not discussed at that meeting. The type of jobs and the papers were discussed just with Mr. Safran and myself. They were not discussed at that meeting.

Q. Was it at that time that he said that the particular jobs have to be chosen with care? A. Yes. And he stated that he would—he would choose those jobs and then I reconstructed on the ones that were actually done and he come back with a list and the timetables of the jobs and the records were reconstructed.

Q. Reconstructed or constructed? A. Some were reconstructed and some were constructed.

Mr. Luciani: Off the record.

(A discussion takes place between Mr. Luciani and Mr. Dowd which is off the record.)

Mr. Luciani: Back on the record.

Q. On your way from leaving Mr. Giordano's office after the meeting you described, were you with Mr. Steinberg? A. Yes.

Q. Did you have any discussion with Mr. Steinberg? A. Yes.

Q. What did he say? A. He advised me that I should immedately resign from that employment and I should seek Counsel and I should (22) also immediately pay back that advancement of salary.

I, um, called up Safran and asked Safran that I had been advised to pay back the advancement of salary, "which even though I can't afford it right now I'm going to do it." And, um, I asked him who should I make the checks out to or what should I do. Then I didn't hear anything from him and, um, then—

Q. He didn't answer you right away? A. He didn't answer me, no.

Q. What did he say, "Wait, I'll get back to you"? A. I don't know whether he had a lot of problems. He just seemed very vague on the 'phone and he wouldn't talk. He said, "I'll call you."

Then I didn't hear from him. Then I found out that he had gone out of town or something, gone to Miami.

Q. There must have been a substantial period of time between that 'phone call to Safran and when you heard he had gone out of town. A. Yeah. I don't know what the date was. I had to raise $500 on the initial payment so I was saving the money to raise that. So then—

Q. Who came up with the $500 figure? A. Well, I did. I called then. I called Mr. Giordano and I said to Mr. Giordano that, "You know, I don't know who to make this check out to. Safran is no longer here. I guess (23) Madison Agency was sold or something."

And Mr. Giordano said to make the check out to—I guess I made it out to Mr. Giordano. I have a copy of the check. It's either Mr. Giordano or the Madison Agency in care of Giordano, because he says he was trustees for the corporation or something. And that is

who I made the check out to and sent it off. Then I sent another one for $250. One of them was cashed and I have the receipt. The other one was not cashed and I don't have the check and it was never sent through the bank.

Q. They both were sent to Mr. Giordano? A. Yes.

Q. On the way back from the meeting again with Mr. Steinberg, did Mr. Steinberg have any discussion about the fact that you revealed for the first time that you really didn't do any work for the salary? A. Yes.

Q. What did he say? A. He stated that I was in, you know, a very serious position, that that shouldn't have been done and that I should immediately try to get legal advice and legal counsel, "because if the State is investigating this thing, you know, you should be truthful and get yourself a legal counsel, criminal lawyer."

Q. Did he volunteer his services? A. No. He said he wasn't qualified, that I would need (24) a criminal lawyer.

Q. Did he indicate that he wanted to assist you in the preparation of the files? A. No.

(Mr. Dowd is called into Court and the Statement is temporarily interrupted at 4:45 p.m.)

(The Statement is resumed at 5:08 p.m.)

By Mr. Luciani:

Q. Did he say anything about the preparation of the files? A. No.

Q. Did he offer any advice as to the preparation of the files? A. Nope.

Q. Did he indicate to you that he didn't want to be a part of it? This is Morton Steinberg on the way back from the meeting. A. He said he could not in any way, shape or form get involved. He advised me to get a criminal attorney immediately. That was his recommendation, that I just get a criminal attorney and then he told me one thing that I remember very vividly. He told me if I was contacted, to tell the truth, don't start off with any type of a lie.

Q. And in fact did you do that? A. Yes.

(25) Q. That time following when Detective Feldherr visited you in March of 1973, did you in fact volunteer the truth to him? A. When?

Q. This is the incident in your office with the letters, to refresh your recollection. A. I—I had reconstructed letters which he stole, or whatever it was, from the edge of the table.

Q. This is the phony letter explaining the $15,000 with the phony date on it? A. Yeah.

Q. In the course of that conversation you did not tell him the entire truth? A. No, no, I did not.

Q. In fact, you relied— A. I relied upon the reconstructed records.

Q. And who told you to do that? A. Who told me to do—

Q. Yes. A. Well, that was—

Q. Did you have a conversation with Mr. Safran during the course of the preparation? A. Yes. That was the essence of the reconstruction of the records and that we were fully familiar with those records that were done

and I was--he said, "If you are going (26) to say this about the record I would say this," so that our stories coincided.

Q. Stories to whom? A. To the investigator.

Mr. Luciani: Off the record.

(A discussion takes place between Mr. Luciani and Mr. Dowd which is off the record.)

Mr. Luciani: That concludes the Statement Thank you.

(The Statement is concluded at 5:16 p.m.)

* * *

I, ROBERT E. ROSTOFF, Official Court Reporter and Notary Public of the State of New Jersey, certify the foregoing transcript.

Robert E. Rostoff, C.S.R.
Official Court Reporter

Transcript of Motions In Camera, December 15, 1975

STATE OF NEW JERSEY

OCEAN COUNTY CRIMINAL COURT

INDICTMENT No. SGJ-27-75-10

STATE OF NEW JERSEY

vs.

JOSEPH S. PORTASH,

Defendant.

Toms River, New Jersey

December 15, 1975

Before:

HONORABLE WILLIAM E. O'CONNOR, JR., J.S.C.

Appearances:

WILLIAM F. HYLAND, Attorney General,
By: ALFRED J. LUCIANI, ESQ., Deputy Attorney General.
G. MICHAEL BROWN, ESQ., Deputy Attorney General.
For the State.

JAMES T. DOWD, ESQ.,
For the Defendant.

(3) The Court: For the record, this is the matter of State of New Jersey versus Joseph S. Portash, Defendant, the Superior Court, Law Division, Docket No. SGJ-27-75-10. Mr. Portash's counsel, Mr. Dowd, has moved before the Court today for a Bill of Particulars and, alternatively, to dismiss Counts II, III, and IV of the indictment. Mr. Dowd's accompanying letter requested that the Court conduct these proceedings in camera. I have called to counsel's attention the provisions of the Court rule which requires that all proceedings, including motions, must be conducted in open court. The Court has called counsel's attention to the provisions of Rule, I believe it is 1:22, that permits the Court to hear such motions in chambers, provided that it be established to the satisfaction of the Court that an injustice would result if the matters were heard in open court, in accordance with the rule. Mr. Dowd, you may be heard, sir.

Mr. Dowd: Thank you, Judge. May it please the Court, Your Honor, we have pending before the Court this morning the motions that the Court has referred to. The Court has the brief of the Defendant, with the request for an in camera hearing and the impounding of the pleadings of these motions, pretrial pleadings, and any exhibits that are submitted by the parties. (4) Your Honor, recently we have been advised by the Court—

The Court: For the record—may I interrupt—I understand that the Deputy Attorney General has no objection to these matters being heard in camera.

Mr. Brown: That is correct, Your Honor. There is one correction we have to make on the record, I think, Judge. You referred to Counts II, III and IV of the indictment. It is a two-count indictment, State Grand Jury Indictment 23-75-10. I believe the motions are addressed to Count I and Count II of that two-count indictment.

The Court: Yes, sir. I acknowledged the error.

Mr. Brown: We have no objection to Mr. Dowd's application.

The Court: All right, Mr. Dowd, you may be heard.

Mr. Dowd: Thank you, Judge. And recently, Judge, within the last several weeks, we have been advised that the Court has scheduled the trial of this matter for January 5, 1976. Today is December the 15th, 1975. In less than one month's time, should our motions to dismiss be denied, a petit jury will be selected from the peers of Mr. Portash of the community of Ocean County. Your Honor, there is a very serious issue before the Court, soon to be submitted in evidence, of (5) the question of immunity of certain statements given by Mr. Portash, including certain testimony taken before the statewide Grand Jury. It is my judgment, Judge, that should these statements and Grand Jury testimony be made a public record, and any discussion or argument about same be picked up by the press, that they will be inflammatory and will be dispersed throughout this community, making it practically impossible to select a jury who is not aware of their existence, and I think they will highly prejudice the Defendant.

Your Honor, from your experience on the bench here to take judicial notice, the Asbury Park Press has a great circulation, as well as several other papers in this community. And because the time of the trial is less than a month from the time of these disclosures, I don't think the history of passing will permit their fresh impact on the public mind. I think it will make it difficult, for the State as well as for the defense, to select a jury. Because we as a defense, Your Honor, claim an immunity, these

statements at this posture and any fruits therefrom are not competent evidence to go before a jury. And if they are exposed to public light at this time, they will be outside of the judicial process, being revealed to those persons who will be or may be available for jury duty. My client is here (6) present, Your Honor. He has been explained his right to an open court hearing, and he joins with me that at this stage it be kept in camera to present polluting the pure springs of a jury selection on his behalf.

The Court: Thank you, sir. Does either Deputy Attorney General care to comment?

Mr. Brown: No, Your Honor.

Mr. Luciani: No, Your Honor.

The Court: Mr. Dowd omitted to mention that the Defendant in this case is a high county public official who has in the past—and the Court takes judicial notice of it —been subject to much publicity concerning matters arising out of his office. The Court feels that the interest of justice would best be served by having this hearing in camera and the record and transcript of the same impounded until the trial is over.

Now, the Court has before it a motion for a Bill of Particulars and a motion to dismiss Counts I and II of the indictment. I will take them in the order that they should be handled.

Counsel contends that the indictment should be dismissed for improprieties occurring in the Grand Jury process. Counsel contends that the minutes disclose—or the transcript, rather, discloses that on April 24, (7) 1974, the transcript recites: "Mr. Luciani and the Foreman were sworn by the Deputy Foreman and hereafter read the aforesaid testimony, Mr. Luciani reading the questions and the Foreman reading the answers." Counsel has referred to Rule 3:6-4, covering the duties of the Foreman

of the Grand Jury, which rule states: "The Foreman shall have power to administer oaths and shall endorse all indictments. During the absence of the Foreman, the Deputy Foreman shall act as Foreman."

Counsel contends in his brief that the indictment is defective because the witness was sworn by the Deputy Foreman rather than the Foreman. The Court notes that no case law citations have been revealed to the Court in reliance upon that particular motion. You may be heard, Mr. Dowd.

Mr. Dowd: Your Honor, my review indicates that there is no case law that I can find on this point, so I am relying specifically on the rules that are mandatory. Your Honor, I'd like to refer the Court, as a preface to my remarks, to the rules of evidence. Rule 18, and I quote it, Judge, that's at Page 63, Your Honor, of the 1972 edition, New Jersey Rules of Evidence. It says: "A witness before testifying shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided (8) by the law." It goes on to say, "No witness may be barred from testifying because of religion or lack of it." Your Honor, We recognize that Grand Jury proceedings have a wider scope in the admissibility of evidence. But we do recognize that the Grand Jury proceedings are an adjunct and arm of the court—these are basic premises, Your Honor—and that their conduct is controlled by the courts. And the rule says—that's Rule 3:6-4 that we referred to, Your Honor—the duties of the Foreman and—Grand Jury Foreman and Deputy Foreman, the Foreman shall have the power to administer oaths, shall enforce all indictments.

So at that posture, Judge, a witness who shall testify under an oath can be sworn in by one person as the

Foreman. There is an alternative situation provided for by the rule. That is that in the absence, during the absence of the Foreman, the Deputy acts as Foreman. The Deputy's authority is contingent upon the absence of the Foreman. In this case, Your Honor, the record reflects that the Deputy Foreman acted without authority when he swore in the Deputy Attorney General and the Foreman to give hearsay testimony by reading a prior transcript. Therefore, it was a procedural due process deprivation by my client in the handing down of the indictment, and therefore the indictment should be (9) dismissed. I personally, Judge, have found no case law on this.

The Court: Mr. Luciani.

Mr. Luciani: Your Honor, the State considers the rule and takes note of the rule. However, we feel that the rule is directory in nature, defining the rights and responsibilities of the Grand Jury to provide for contingent circumstances in the absence of a Foreman. But it doesn't pertain to any substantive rights of an accused nor the procedural dignity of the Grand Jury, nor in fact the legal authority to administer an oath. And for these reasons, we feel that such a directory rule, as it does not pertain to the substantive rights of any particular individual, really bears only on the conduct internally of the Grand Jury and not affecting any rights, and therefore it should have no effect on the legal validity of the indictment, it being technical in nature.

The Court: Do you care to respond, Mr. Dowd?

Mr. Dowd: Well, we are discussing the internal operation of the Grand Jury.

The Court: Do you care to reply to Mr. Luciani?

Mr. Dowd: Just briefly. Mr. Luciani says it is an

internal problem. We realize it is an internal (10) problem, but we think it makes it defective, Judge.

The Court: The Court notes an annotation to N.J.S. 2A:73-4, referring to the case of *State* v. *Garrison,* recorded at 130 N.J.L. at page 350. And the footnote says: "Even though Foreman of Grand Jury, or in his absence one selected by Court, has power to administer oath to witnesses, it is not incumbent that witnesses before Grand Jury be sworn."

So if that case stands for that principle, assuming that an oath were in fact defective, which the Court is not willing to concede, even though the witnesses were not in fact sworn, it would be the Court's opinion that that would not affect the validity of an indictment based upon the testimony of unsworn witnesses; because treating this as Grand Jury misconduct, or as counsel uses the word "impropriety", the Court will agree with the State that that rule is directory in nature and not mandatory, by virtue of the applicable case law, that a Grand Jury may return an indictment on the basis of testimony which has not been sworn to. The Court feels that this would be stretching what possibly may be a procedural imperfection, without conceding that it be a procedural imperfection, to the end that it would defeat the function of the Grand Jury.

So the Court finds that, because of the fact (11) that the Foreman was sworn and the oath was administered by the Deputy Foreman, if the oath were of no consequence or no value whatever, under the Garrison case, then the Grand Jury would be confronted with unsworn testimony, which under the Garrison case is competent to return an indictment. So the Court would deny that motion, Mr. Dowd.

Mr. Dowd: Your Honor, I am following your format as you want to proceed.

The Court: Yes, sir. Your next point would be the indictment should be dismissed, or in the alternative, a hearing granted or, in the further alternative, an adjournment granted; and there you are raising, of course, the concept of witness immunity, and you are asking alternatively that, in view of the Vinegra case, that alternatively the Court should conduct a hearing to determine what evidence if any should be excluded at trial, if your first motion is denied.

Are you prepared to argue that, sir?

Mr. Dowd: Yes, Your Honor.

The Court: All right. You may be heard.

Mr. Dowd: Your Honor, before I go to the heart of that argument, I think for the Court's edification certain facts which are substantiated (12) ought to lead up to what I am going to say. On November 29, 1974, the Defendant was served a subpoena duces tecum, and—On October 29, '74—I'm going to run through a chronology of dates—the Defendant was served a subpoena duces tecum to appear before a statewide Grand Jury in Trenton. Pursuant to that subpoena, the Defendant appeared on November the 14th, 1974, at which time he exercised his right under the Fifth Amendment not to testify. The hearing was held before Judge Schoch. On the same day, he was ordered to produce certain documents, over his objection again in the Grand Jury, that it was in violation of his Fifth Amendment privilege, that he was responding to an order of the Court. On the same day also, Judge, after that testimony, the Defendant was served a separate second subpoena, and that was a subpoena duces tecum to reappear at a later date, which would be the following week. The following week, on November 14th, pursuant to a subpoena,

the Defendant appeared before the statewide Grand Jury. Without any question in the representation by the Attorney General, Deputy Attorney General, his representative, Mr. Portash was a target of the investigation from the very first subpoena, represented affirmatively by the Attorney General's office. On November 14th, Your Honor, Mr. Portash (13) returned to Trenton in compliance with the subpoena, and an agreement was reached before he went into the Grand Jury room. That agreement is referred to in our documents, Judge, as Exhibit 4. The State was represented by Deputy Attorney General Alfred Luciani, who is present here today. The Defendant was present. He was represented by me as his attorney. The substance of that agreement, Judge—and I won't read it, it is in the exhibit—was that no testimony would be used by the State in any criminal prosecution to which Mr. Portash would testify to. The agreement further said, and I refer to lines 20 through 23 of the third page of Exhibit 4, when the Deputy Attorney General said: "You understand the fact that nothing you are about to testify to can be used against you personally in any subsequent criminal prosecution?"

We are interpreting Exhibit 4, Your Honor, as one of the bases to dismiss the indictment as a contract between the State of New Jersey, represented by competent counsel, and Mr. Portash through his counsel. Our authority for that contractual agreement is *Santobello* v. *New York*, 404 U.S. 257, cited 1971. In that case the Assistant Prosecutor for the executive branch of the government in New York, Your Honor, was held to an agreement they made by the Supreme Court in (14) an out-of-state decision.

Now, moving along in the chronology, Judge, I will come back to the agreement in a moment. On February 5, 1975, Mr. Luciani appeared in the Monmouth County

Courthouse for reasons that I was there on trial before Judge Thomas Yaccarino, for the purpose of taking a statement from Mr. Portash, using my word, to nail down his testimony, in anticipation that he was going to be a witness for the State in the matter of State versus the late Mr. Schmertz, Leisure Technology, and one Safran. That indictment was returned and is presently pending before this Court. On February the 5th, 1975, the very same day, Mr. Portash gave an extended statement, covering all those matters which are discussed therein.

Your Honor, I will submit to the Court the statements so that you may make a factual finding from them. It was the sole purpose of—That statement was the direct result of another trunk of the tree that had grown from the acorn of November 14, 1974, Judge, when the State said, "Nothing will be used against you about what you will testify," and the Defendant began to cooperate with the State, pursuant to his understanding of what was going to occur. After February 5, 1975, additional demands were made upon the Defendant for him (15) to preserve his what we consider already acquired immunity, or to use another expression, for him to preserve the promise that he would not be indicted where he cooperated with the State. Additional demands were made, Your Honor, where the State requested of my client that he give up all employment of a public nature whatsoever, that he enter into a settlement on a pending civil suit which arises out of a theory—out of the circumstances, in the Chancery Division in this jurisdiction. The additional demands, Judge O'Connor, were rejected and considered repugnant by my client. As a result of that rejection on April 24, 1975, the Deputy Attorney General, through hearsay evidence, of testimony of—

The Court: When you say, "As a result of that rejection on April 24th," are you pinpointing the date of the

rejection, or are you connecting it, the April 24th date, with something else?

Mr. Dowd: The April 24th, Judge, is the date that Mr. Portash was indicted.

The Court: I see.

Mr. Dowd: The date of the rejection, Your Honor—Let me correct this. March the 27th, 1975, as alluded to in Mr. Luciani's statement to the Court, the Defendant was given two alternatives, which alternatives (16) incorporated conditions that were not in certain of the preceding conditions that had started the ball rolling. Between March 27th, 1975 and April 24th, the date of the indictment, there was a rejection. In the alternative number one, the State requested that the Defendant cooperate in this case, this case being—I will refer to it, Judge, for the record, as the Schmertz case—the cooperation in any other cases that the Defendant might have any knowledge of, a resignation of his township position with the Town of Manchester, which he was then serving as Mayor. The Defendant ceased, may I add parenthetically, Judge, to be a Freeholder of Ocean County, effective midnight of 1974. In the civil judgment there was a request that it be settled, a judgment seeking some thirty some thousand dollars, for $24,322.00. The second alternative proffered to the Defendant, March 27th, 1975, was that he would cooperate in this case. Cooperation was always a major factor.

The Court: When you say in this case, are you referring to—

Mr. Dowd: Meaning the Schmertz case. There was no indictment, Your Honor, at the time of this suggestion. True cooperation in any other cases, which would mean of any investigatory needs that Mr. Portash (17) might help the government; a resignation from all public posi-

tions. And the significance of that is that Mr. Portash was and is Director of the Pinelands Commission in South Jersey. And the civil judgment, a compromise, an offer of—suggested offer of compromise of $15,000. Mr. Portash's position was that his job at the Pinelands was in no way related to this case, was in no way a part of the agreement reached between the State and himself back on November 14th, 1974, which was contained in the Exhibit 4, Your Honor.

As a result of Mr. Portash's not accepting the additional request, which came from the hierarchy of the Attorney General's office, and/or the Executive Office of the government—because I assume Mr. Luciani was working with authority from someone who is his superior—Mr. Brown was basically just into the case at this time, Judge, preparatory to the trial of the Schmertz case. May I further point out, Your Honor, between or up until the day of the indictment against Mr. Schmertz, my client was interviewed on occasions by the State, preparing him as a witness somewhat anticipating maybe a summer or fall trial on the Schmertz matter. Be that as it may, Your Honor, when he rejected the additional demands, which were made far after November 14, 1974, when he was told that nothing that he testified to or (18) about would be used against him in the criminal prosecution, he was indicted.

Your Honor, you have already heard there were no live witnesses. They merely read some additional testimony from witnesses, and certain documents concerning public minutes, et cetera, were introduced at Grand Jury. Judge, I want to emphatically say, because I may lose the target of my argument here, I am not asking for a dismissal on the basis just of an immunity. Number one, we are saying we made a contract with the State of New Jersey that they would not use any of the evidence that Mr. Portash testified about, that it is obvious if they do not use said evidence, they have no case. This is based upon a review of the testimony between--before the two days of the Grand Jury that indicted Mr. Portash.

The Court: May I interrupt? I note on your point three your argument, summarized, is: "The activity outlined in a Statement of Facts—" I am reading from Page 7 now—"and supported by the exhibits annexed hereto indicate that the Defendant and the State of New Jersey entered into a contract whereby the Defendant was to be given immunity from prosecution in return for his testimony in the case of State v. Schmertz. Pursuant to the doctrine laid down in (19) *Santobello* v. *New York*—" the citation—"the Defendant's contract is enforceable and thus the indictment returned against him should be dismissed."

Are you changing your position, sir?

Mr. Dowd: No, I am not, no. Your Honor, I was looking for what is referred to as the Schmertz indictment.

The Court: The number is in your brief. Did you want to see the indictment itself?

Mr. Dowd: I have a copy: I want to submit it as an exhibit, Judge.

The Court: The Court can take judicial notice of it, counsel. It is SGJ-24-74-2, and it is filed in this County under Rule 9, and the Court is compelled to take judicial notice of it.

Mr. Dowd: Your Honor, after—I will hand it in, because it is factual. Judicial notice is fine, if Your Honor is familiar with it. But Judge, you know it was written that, in Genesis, that in the beginning they took clay and breathed a soul into it. Saying this for the moment—not

to quote the Bible, but I have some facts to go on—it has been a torturous history of mankind, that somewhere along the line they breathed fundamental fairness into the judicial process. That's really what the game is about.

(20) On February the 5th, the day that the statement was taken of Mr.—by Mr. Luciani in the Monmouth County Courthouse of Mr. Portash, Judge, that was the day the Schmertz indictment was returned. If one reviews the contents of that indictment, those Defendants were accused of various crimes involving corruption, to use the generic word, with Mr. Portash. Mr. Portash was not a named defendant. He was not a named conspirator. He gave a statement. He was interviewed by the State. Now, there must have been a reason. They don't act irrationally. I assume they don't, a prima facie presumption that they act rationally.

The Court: A reason for what, Mr. Dowd?

Mr. Dowd: A reason why he was omitted from that indictment. There must have been a reason that he was interviewed by the State's lawyers, preparatory to his trial. They, the State, must have had a rational purpose in mind. Mr. Portash must have had a rational purpose in mind, and God hope I, as the attorney, have some rational purpose in mind. This all goes back to the time of the Grand Jury of November 14th, when he was expressly told it would not be used against him. It was by some higher authority—frankly, to use Mr. Brown's words so often used by hir —somebody said: We (21) have to get more. The "more" was too much. And then the State went back and indicted him.

We say, Your Honor, that we could have prevented ourselves from being before this Court, had we resigned from the Mayorship of Manchester Township on March 27 and paid the State some $23,000, we wouldn't be here. Or

had we resigned on March the 27th or shortly thereafter, from Manchester Township as Mayor, and Executive Director of the Pinelands, saved ourselves some nine, close to $10,000, paid $15,000 to the State coffers, then we would not be indicted. And that is a reflection not upon the gentleman before Your Honor. It is a reflection that the hard and arduous work of bargaining between Mr. Luciani and myself, since October 29th, thereabouts, up until the spring of this year, with the diminishing participation by Mr. Brown because he commenced trial, somebody called a shot and pulled the rug out from under us. I use those words, Judge, with discretion. Had we paid $15,000 and resigned from Mayor of Manchester and resigned as Executive Director of the Pinelands, we would not be indicted. Had we paid an additional $9,000 to $10,000, we could have kept our job as Executive Director of the Pinelands, and Judge O'Connor, not be indicted. Not be indicted, why? What authority does the Attorney (22) General's office have to do that? In what public interest? I would assume their position is: We made a proposition back on November 14th, we wouldn't be doing this. That proposition was buttressed and embellished in February, when we ran all the way to the Monmouth County Courthouse and were taking statements the day Schmertz was indicted to nail down his testimony.

I say, Your Honor, in concluding this point on the contract, under the Santobello doctrine—They may say, "Oh well, it was not an affirmative contract." There was an offer, there was an acceptance, Your Honor. And my client moved and did things in pursuance thereof, which he may not have done—I can't say what history would have done had it gone another way—without those representations. On the basis of that history, Judge, I think the indictment should be dismissed.

The second point, is that—Your Honor, I refer to the Public Employees Statute. And, Your Honor, also on the third point I refer to the *State* v. *Vinegra* case, 134 Super. 432. Judge Crane cited or wrote the opinion of the Appellate Division just this summer. Usually, and I am speaking generally, under the doctrine of Sarcone and some other cases where immunity came in and someone was indicted, I forget where—they use transitional or target of investigatory—(23) well, they all merge, the Fourth and Fifth Amendment—it all merges, Judge, in fundamental fairness. Generally, if there was a remedy, the Court's remedy was to dismiss the indictment, as a deprivation of a Fifth Amendment reason, or as the supervisory authority under the Fourth Amendment of the Federal Constitution. In Vinegra, Judge Crane says that the indictment should not be dismissed, that Your Honor should hold the hearing—as I read Vinegra, Judge—find out if there is any tainted evidence to be used by the State, Your Honor, under this doctrine. We feel that the Vinegra case is going up to the Supreme Court of New Jersey as of the 4th of this month, and it may be overruled by the Supreme Court. I note in Vinegra, Judge, that there is no dissenting opinion; and I can only logically conclude, Judge O'Connor, that the Vinegra case was not taken up by the New Jersey Supreme Court because it must do so where there is a split decision in the Appellate Division, but is taking it up for a reason, either to clarify it, amplify it or to reverse it. And the doctrine of Vinegra, I feel, Judge, is directly related to the immunity issue in this case, though factually, there is some variation. And I think it would be an enormous consumption of time, Judge O'Connor, if we tried this case and the Supreme Court six months from (24) now with the decision either overruled

Vinegra or through its decision gave instructions of how to handle the situation where there is immunity, as to when and what is excluded in the trial. It may be they will say that in a case of this nature, the remedy is in the dismissal. So in the last alternative, if Your Honor does not dismiss on the basis of my arguments, that we have a hearing to—with exact particularization as to witnesses, their testimony, and documentation, we know what is going into this trial. That's all I have on this point, Your Honor.

The Court: All right. Thank you, sir.

Mr. Luciani: I'd like to respond, both factually and substantively, in chronology, of course, for the sake of being easier to follow.

On October 29th, the State did in fact subpoena Mr. Portash for an appearance before the State Grand Jury on November 6. On November 6, Mr. Portash appeared with his attorney, Mr. Dowd, who for the first time, at this point indicated to me that Mr. Portash was in fact reluctant to testify and would claim the Fifth Amendment. Prior to that time, I'd been advised by several personal interviews that Mr. Portash did in fact want to discuss this matter with us. When Mr. Portash appeared, the State considered that the (25) information subpoenaed was desirable, and presented Mr. Portash before Judge Schoch for argument, one of the arguments being the applicability of the Public Employees Act, the Immunity Act. Judge Schoch considered the Act applied pursuant to our arguments, and ordered Mr. Portash to appear before the State Grand Jury, present the documents subpoenaed, and at that point that's what was done. We resubpoenaed Mr. Portash for November 14th, and on November 14th, preliminary to any appearance before the

State Grand Jury, and again considering that the Public Employees Immunity provision justified our act, we indicated on the record in camera the following: "We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury. No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before."

On the basis of those representations, Mr. Portash appeared and testified concerning the documents presented a week before. The testimony pertained only (26) to the documents, the preparation, as my recollection serves me —we will certainly make a transcript available—it pertained only to the preparation of the documents, when they were prepared, and how they were prepared, and for what reasons they were prepared. Sometime after that, certainly prior to February 5th, our discussions went into greater detail as to what could be done to dispose of the problems, overall. The problems are, overall, were the particular allegations that were involved in this particular case at this time, involved with several factors. I believe the discussions first took place about two weeks after the November 14th appearance. It was always a prerequisite to all discussions about this "plea bargaining", that Mr. Portash was to resign from his Mayor's position, as that was the center of controversy in this particular case. In addition to that, we would, of course, expect him to cooperate in this particular case. But most importantly, and I believe Mr. Dowd will recall, an interview in Director Boylan's office in which it was explained that Mr. Portash's value to the State pertained to another investigation, not just general investigations, but one in particular involving the Pinelands Environmental Council and a contract with Meridian Engineering. That was the subject of the original discussions about what (27) could be done with this situation. Soon thereafter, discussions about restitution entered the picture, certainly again—well, before the February 5th statement. The subject of restitution centered around the amounts Mr. Portash received for this alleged employment at the Madison Agency, and the justification for the State to take this position with Mr. Portash based on his utility in this investigation and other investigations, and what action we could legitimately take with him, that is, resign and restitution. It was agreed, in my judgment, and I believe Mr. Brown and Mr. Dowd will agree, that resignation from the Mayor's position was the first step, and it was my understanding that that was to be done prior to January 1, 1974—'75, I'm sorry. And that was not done.

We continued discussions, and prior to this, just the evening before the February 5th episode, Mr. Dowd and I had a lengthy discussion on the telephone, at which time Mr. Dowd indicated to me that he could not pay the $24,322 figure that Mr. Dowd mentioned before, it was just too high. And it was just too high, and that he didn't feel that much of a restitution was necessary, given the facts in the case. I discussed the matter with Director Boylan around that time. He indicated that there would be a probable restitution of (28) the differences of dollars and cents, which was all we were differing about at that particular time. At this time, we proceeded with the indictment on the basis of those discussions that evening. We

proceeded with the indictment of the other persons involved, and we held upon any final decision on Mr. Portash until later on. Sometime after the February 5th discussion—and the date escapes me—we had a meeting at the East Orange office of the Attorney General's office, in which, at which Mr. Portash, Mr. Dowd and myself were present. Mr. Brown was not present at this particular meeting. In this particular discussion, we discussed the problem with the money. And at that time, Mr. Portash indicated that the money really wasn't the problem. There were other problems in terms of his resignation and his own mental state and whether or not he could justify doing those things. The negotiations were suspended for some time, I'd say two to three weeks, because of the difficulty. When Mr. Brown and myself pressed Mr. Dowd for a final determination, we finally got together on March 27, 1975 at the East Orange trial office, at which time Mr. Dowd, Mr. Brown and myself discussed the various alternatives that we could live with. Sometime prior to that time, we indicated that if the dollar and cents amount was to be minimized down to $15,000, we would (29) require something in addition, that is, resignation from another public office because of the overtones of the particular transactions here. Otherwise, we would abide by our original representations to accept $24,322. $24,322 was the net amount Mr. Portash received after taxes. We would accept resignation from the Township Committee and Mayor. We would require cooperation in the Pinelands Environmental Council case, and we would expect cooperation in this particular case. The second alternative was added basically because Mr. Dowd vehemently objected to the amount of money, and because of the indications of concern from my superiors about resignation

from one public office and not taking any additional steps with another public office, both involving public trusts. Based upon that, we gave a second alternative on March 27th, that is, cooperation in this case, cooperation in the other investigation, resignation from both positions, and a civil judgment in the amount of $15,000, with conditions for repayment, Mr. Portash through Mr. Dowd rejected both, and I was requested to talk to Mr. Portash directly, and I don't normally do that. I thought it was quite extraordinary, but I acceded to the request of Mr. Dowd, and both Mr. Portash and Mrs. Portash, because of the—

The Court: Who requested you? Was it a (30) hierarchial request from—

Mr. Luciani: No. Mr. Dowd requested me to call Mr. Portash. Mr. Dowd represented to me that Mr. Portash wanted me to discuss the matter directly with him. At the time I called him up, we had a discussion.—I believe that it spanned an hour, an hour to two hours on the telephone. And my recollection—and I don't want to misstate or even implicitly misstate—but the discussion centered around his ability basically to live with himself, and whether or not he was making the right decisions. And we came down to a final determination based on one thing and one thing alone, Your Honor. As I understand it, this was a matter of principle. Mr. Portash was convinced in his own mind that he really hadn't done anything criminal. He felt that a resignation from public office—and I believe the term was "putting his tail between his legs"—was tantamount to an admission of guilt, and he couldn't live with that, and he chose rather to contest the charges, quote, that would be levied against him. Through the entire negotiations, it was clear to everybody that there was always a possibility of lodging the original

charges, that nothing altered that pending final resolution of these problems. Mr. Portash represented and Mrs. Portash indicated very strongly that neither felt that Mr. (31) Portash had done anything wrong, that to pay the money and to resign would be much too much for them to bear in terms of their own self-esteem and stature in the community, and he chose rather to defend on the basis of principle. It wasn't a difference between $24,000 and $15,000. It had nothing really to do with the amount of the money. It had to do with what he chose as what was right for him at that particular time. As a result of that discussion, after I again, I believe, spoke to Mr. Dowd after concluding my discussion with Mr. Portash, I informed them that we would present the matter to the Grand Jury, and that it would be presented in such a way that it would segregate everything that we had before and matters of public record, from anything that we discussed with Mr. Portash and anything that we could have derived, which we didn't, but anything that we could have derived from any discussions with Mr. Portash.

I represent to the Court that all evidence pertaining to this matter was accumulated prior to December 1st of 1974, other than the statement of Mr. Portash on February 5, 1975. While it may have been accumulated—some of the materials involving public record were introduced in the Grand Jury, it may have been at a later time, but these again pertained only to public records of public agencies, such as minutes, (32) opinions of counsel, and the decision of the Public Utilities Commission. And it is on the basis of the fact that we feel that the November 14th representation and, quote, contract, was laid upon the record—and again, I stress that no representations—and I am quoting—"No representations have been made

insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before."

Everything that flowed from that, and while that was embellished upon in discussions, it was embellished upon to the extent that if Mr. Portash agreed with our requests on these four different aspects, that we could justify in our own minds taking the extraordinary step of insulating the public office in the case because of his cooperation, not so much in this case, but in a case that could not have been made without his cooperation. And when that fell through—and the reasons it fell through are pretty much as has been stated here—we proceeded with what we considered to be a good faith prosecution.

Mr. Brown: Let me just make a—

The Court: You wish to supplement Mr. Luciani's remarks?

(33) Mr. Brown: Very briefly, Judge. I became involved in the investigation of the subject matter of this indictment against Mr. Portash during January of 1975. My first involvement was the arraignment date of Leisure Technology Corporation and Robert Schmertz and Donald Safran.

Following that initial involvement, I had contact with Mr. Portash on one occasion—on two occasions. First, he and Mr. Dowd came to the East Orange office, I believe in February of 1975, for the purpose of my reviewing with Mr. Portash his anticipated testimony in the trial of State versus Schmertz, et al. On the second occasion, with the agreement and through the suggestion of Mr. Dowd, I met with Mr. Portash at his home. His wife was not present during the conference, but came to the house

in the middle of our conference. And the subject of that conference was his anticipated testimony in the matter of State versus Schmertz, et al. There is some suggestion by Mr. Dowd that there were additional demands placed upon Mr. Portash to preserve, as he says, to preserve the promise that he would not be indicted. I think that is factually incorrect, Your Honor. I think there was never a promise that I was—had any knowledge of directly or indirectly, made to Mr. Portash that he would not be indicted during November (34) through April—November '74 through April 1975. What there was, Your Honor, was an attempt to arrive at a solution of the problems involving Mr. Portash which would avoid an indictment and avoid the necessity of the indictment. So I think the premise that there was a promise not to indict is an incorrect premise. There was a promise before the Grand Jury when Mr. Portash first testified that nothing he said would be used against him in a subsequent criminal prosecution. There were discussions from January through April of 1975. The end of the discussions or the hope of the discussions, was some resolution of the pending information against Mr. Portash, a resolution which would avoid his being indicted. These resolutions involved resignation from certain jobs and the entry into a consent judgment for the return of money paid to Mr. Portash by the Madison Agency. The representations of Mr. Luciani and I as to the joint conferences that were had are correct. These conferences were not plea bargaining conferences, because there was no indictment in effect at the time. These conferences were an attempt by—a sincere attempt—by Mr. Dowd, Mr. Luciani and myself to arrive at a resolution of the pending information against Mr. Portash, without the necessity or the effect of an indictment. My recollection of the facts as to (35) the resig-

nation of the position as Mayor of Manchester Township were that Mr. Portash was—that Mr. Portash was going to resign, I believe, on January 1, 1975. There was a request for an adjournment of that resignation date, agreed to by Mr. Luciani, to February 1, 1975. When there was no resignation forthcoming or no resignation submitted by Mr. Portash, there were inquiries made by our superiors as to why the resignation had not been submitted, and why we represented to our superiors that the resignation would take effect on January 1, 1975, and that a part of our negotiations had not been complied with. There were some telephone conferences which resulted in a meeting held by Mr. Dowd, Mr. Luciani and myself in the East Orange office, on March 27th of 1975, for the purpose of setting forth in writing what the resolution of the pending investigation would be as to Mr. Portash. Mr. Dowd—I believe it was just prior to Easter—Mr. Dowd indicated to Mr. Portash he was going away to a home, I believe in Vermont, for a few days with his family and think it over. When he returned, there was the request, as Mr. Luciani and I stated, that there be a direct contact with Mr. Portash, a request made by Mr. Dowd. Following that direct contact, neither of the proposals which the State had submitted to Mr. Dowd could be or would not be complied (36) with, and it was decided to let the chips fall as they may. And Mr. Luciani and I then obtained transcripts of the evidence that was before the Grand Jury, prior to our contact with Mr. Portash, and presented that evidence to a Grand Jury, which returned the indictment which is the subject matter of this motion.

Those are the facts as I recall them, Judge. I think that the crux of the problem before the Court is the determination as to whether or not there was a contract. There

was no contract to my knowledge. Secondly, whether or not there were additional demands and a promise that he would not be indicted. There was never to my knowledge any promise made to Mr. Portash that he would not be indicted. What there was, there were sincere efforts by the Attorney General and the defense counsel to resolve this investigation against Mr. Portash in a manner which would not include an indictment. Those sincere and timely efforts did not reach a fruition whereby the matter would be disposed of other than by indictment. And the evidence which was pre-existent from our conferences with Mr. Portash was presented to a Grand Jury, and the indictment was returned.

Mr. Luciani: I would add one other thing, Your Honor. In the March 27th, 1975 conference, a (37) written document, a copy of which I have in my hand, culminated from it. And at the bottom of it, apart from the—

The Court: If you are going to refer to it, we better have it marked, Mr. Luciani.

Would you mark it S-1 for identification, please?

(The document was received and marked S-1 for identification.)

Mr. Luciani: And on the bottom of it, in, I believe it is my printing, as to both alternatives, there was a further agreement. It says: Both—no indictment in Pinelands. That refers to the other investigation that we sought Mr. Portash's cooperation on.

The Court: Anything further from the State?

Mr. Brown: No.

The Court: Do you care to respond?

Mr. Dowd: Just briefly, Your Honor, because we are making a record.

In substance, the chronology is somewhat accurate. Judge, in November of 1974—we had explained to the Court—there was compelled testimony plus the agreement on two different occasions by Mr. Portash. That was the germination of the negotiations handled by Mr. Luciani basically as Deputy Attorney (38) General, and myself as defense counsel. And it was generally understood that we would cooperate with the State in whatever way we could. Sometime at the tail end of that year—and I'm not giving specific time, but a month, six weeks later—it was added to the kitty, the pot, a request for a civil economic payment to the State of New Jersey. It had never been in existence ab initio. That happened in the ballpark of January of '75, Judge. It brought a new factor in. While that was being discussed, and hopefully attempting to be ironed out, we found ourselves approaching late winter, early spring, when, Judge O'Connor, the request and the demand became that he resign from the Directorship of the Pinelands. That's the reason in January, when certain things were expected by the additional demands of someone above the level of the Deputy Attorney General's rank, either of them at any time in these negotiations added a request: If you give up the directorship of the Pinelands, you can settle your civil judgment for $9,322 less. Your Honor, as far as the agreements were understood—of course, it is my judgment—we didn't reduce agreements as a contract to buy and sell a house. Your Honor, I think it is implicit in all these negotiations that the State expected Mr. Portash's testimony in State versus Leisure Technology Corporation, et al., and there would (39) be certain other ancillary requests made of him. But the basic fundamental requests to Mr. Portash prior to Mr. Brown, I am sure, ever even seeing this file, back in 1974, before money demands were made, certainly

way before resignations of a Pinelands job were made, Judge O'Connor, were simply to cooperate with us in this case.

Mr. Luciani: Wait just a second.

The Court: I will give you an opportunity to answer, Mr. Luciani. You stated your objection on the record.

You may continue, Mr. Dowd.

Mr. Dowd: Because it was not until sometime later, after the original representations outside of the Grand Jury room on November 14th, 1974, which is in the exhibit four—

The Court: May I interrupt for a question? Under Point 3, you state: "The activity outlined in a statement of facts and supported by the exhibits annexed hereto indicate that the Defendant and the State of New Jersey —" I am reading from Page 7—"entered into a contract whereby the Defendant was to be given immunity from prosecution in return for his testimony in the case of State versus Schmertz, et al. Pursuant to the doctrine laid down in *Santobello* v. *New York*"—the citation—"the Defendant's contract is enforceable and (40) thus the indictment returned against his"—I'm quite sure a typographical error—"him should be dismissed."

You refer to the exhibits, Mr. Dowd. The exhibits, of course, are the subpoena under date of the 29th of October, 1974; the in camera hearing before Judge Schoch on November 6, 1974; the subpoena under date of November 6, 1974; the appearance before the Grand Jury on November 14th, 1974, and the indictment. Now, are you contending that when the Defendant was instructed that he had immunity under the statute as a public employee, a contract thereby was created under the Santobello case, and that anything that was derived from his testimony could not be used as evidence, or are you contending that

subsequent to this initial appearance before the Grand Jury, further negotiations were entered into resulting in what you contend to be another enforceable contract, separate and distinct from the contractual theory you are postulating under the Santobello case?

Mr. Dowd: What I am saying, Judge, is that a contract was entered into.

The Court: Well, if I take your brief at its face value, the only way I can glean a contract is from the exhibits, because that's what you say here: "The activity outlined in a statement of facts and supported (41) by the exhibits annexed hereto indicate" that a contract was entered into. My point is, what contract and where?

Mr. Dowd: That the agreement of 11-14-74 was made, and that those factors, those overt acts, those verbalizations, those interviews, were in substantial compliance with the understanding reached on the 14th. And the statement of facts indicates that there was substantial compliance, Your Honor, with what was the basic understanding of the people involved. I think that Mr. Portash would not be indicted, and that he would be a witness in the other indictment that we referred to as State versus Leisure Technology.

Mr. Brown: Can we just take a recess for a minute?

The Court: Of course, certainly, and the Reporter, of course. We will take a break.

(A luncheon recess was taken, after which the following occurred:)

The Court: Okay. Are there any further arguments with respect to the contract theory advanced by Mr. Dowd?

Mr. Brown: I have none, Your Honor.

The Court: Mr. Dowd?

Mr. Dowd: I think that pretty well covers it.

The Court: I'd like to ask you a couple of (42) questions, if I might. I note—and I took down my notes—you contended there was a promise on the part of the State that the Defendant would not be indicted. I don't find that in the record, and assuming that it be in the record, I am concerned with whether or not a prosecutor —taking into consideration this Grand Jury is a constitutional body—whether or not a prosecutor could commit a Grand Jury to not return an indictment.

Mr. Dowd: Well, in answer to that specific question, Judge, the answer is no. But of course, the prosecutor controls what is presented to the Grand Jury. In here you have—I think it was marked for identification—

The Court: Yes. I haven't read that yet.

Mr. Dowd: —which is a document which indicates that had the Defendant accepted one of two basically financial propositions, it would not have been presented to the Grand Jury. The Grand Jury is somewhat of a contradiction, Judge, in that it is an arm of your court, that is, you the entity of the judiciary.

The Court: Suppose a Grand Jury says, some member of the Grand Jury says, "What's going on down here in this Pinelands? On our own, we want to conduct (43) an investigation on it."

Mr. Dowd: They can do that.

The Court: And they can do that, and suppose the Deputy Attorney General appears and says, "Look, for matters of certain public policy we don't want you to pursue this." And the Foreman of the Grand Jury says, "Look, we feel that we do want to pursue it. In fact, we are going to exclude the Deputy Attorney General and

even the Attorney General. If he applies to be here, we are going to exclude him from our deliberations. We are going to issue our own subpoenas, call our own witnesses," and they turn around and indict? And then under the contract theory, which is the Santobello case, which of course involves plea bargaining, not indictment, I am concerned about the position you are taking with respect to the existence of a valid contract not to be indicted. Can there be such a thing, Mr. Dowd?

Mr. Dowd: I think—and I'm going to use your word "valid," Judge, in the sense of enforceable.

The Court: Yes, sir.

Mr. Dowd: I won't guess as to the sophistry of whether or not it hinges on ultra vires activities, but I say yes, if the target of investigation lessens his position by cooperating in pursuance of that (44) expectation. And I think the Courts, either under the exclusionary type doctrine of the Fourth Amendment, a Miranda type thing where you have supervisory power, say that the only remedy is the enforcement of it by way of a dismissal.

The Court: Would they dismiss or would they turn around under the Blue case, which is what the Vinegra case is bottomed on, that the rule is one of evidence, that the evidence will be suppressed?

Mr. Dowd: Well, there's a few vague cases, Judge, I'm going to answer that this way—

The Court: A reasonable mind can read the two doctrines and come up with an approach that maybe is an evidentiary ruling. On Page—in the case of *State* v. *Vinegra*—the Court does not have the official report—at Page 5 of the slip sheet opinion, the Court states: "In *United States* v. *Blue*, 384 U.S. 251, 1966, the Supreme Court reversed the dismissal of an indictment which was

allegedly based on testimony of a Defendant obtained in violation of his rights against self-incrimination. The Court stated: 'Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at (45) trial.'" And then there is a series of asterisks and a further quotation: "'Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree inference with the public interest in having the guilty brought to book.'"

Now, the Blue case is the genisis for the Appellate Division's decision in Vinegra, and your motion here is directed to the dismissal of the indictment.

Mr. Dowd: May I comment on that, Judge? Judge, the Blue case is a decision based on the rationale of the applicability of the Fourth Amendment.

The Court: Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment—

Mr. Dowd: They are talking about—Blue is talking about the exclusionary rule in a Miranda type thing where your basic, inherent supervisory control over the administration of justice is a judiciary. You can say you should not do this, this is a prophylactic exclusionary rule.

(46) The Court: Miranda being a Fifth Amendment case, compulsory self-incrimination.

Mr. Dowd: Right. And I think that a reasonable mind can argue that you go the route of the exclusionary rule, which you may be bound by now, you the Judge of this

Court, because of Vinegra, if that's the dominating law until the Supreme Court does something.

The Court: That's right.

Mr. Dowd: If that's the hypothesis on which Your Honor is working, that Vinegra is the applicable law today which the trial Judge is controlled with—

The Court: I am bound by it until such time as the Supreme Court reverses it.

Mr. Dowd: Right. If under our propositions of the Defendant having incriminated himself, et cetera, dismissal based on that, I say that the basis of Vinegra is that you have a hearing to see what is excluded from the trial, and we know where the markers are on the ballfield. That portion of our motion is why we couched it in a hearing or, in the alternative, a delay till the Supreme Court rules. That, Judge, is, that very carefully is what we put just on the point of incrimination. But the contract theory, behold, on the Santobello, is a different type doctrine.

(47) The Court: Well, in Santobello, Mr. Dowd, didn't the Supreme Court say this, that if the parties agree to a plea bargaining, then the sentencing Judge must abide by the plea bargain or vacate the plea and have the matter referred to trial? You are not dealing with any dismissal of a complaint or an indictment in Santobello. Santobello says that the Judge should have vacated the plea and proceeded toward trial. The sanctity of the indictment among all the prior proceedings would have been maintained. In effect, what they are doing is directing, under the contract theory, that the Court permit Santobello to vacate his plea; nothing more, nothing less. But it has nothing to do with the validity of the instrumentality or means by which the man went to trial, namely, the indictment.

Mr. Dowd: Factually, yes, but I think doctrine-wise, Judge—

The Court: But look to Vinegra, which is the law of this State right now.

Mr. Dowd: I have to say that—

The Court: Vinegra says: Don't dismiss the indictment, suppress the evidence, equating it with the concept that although Miranda is of constitutional dimensions, Miranda is nothing more than a rule of admission or exclusion, period.

(48) Mr. Dowd: I agree with you, Judge. Now I am concerned we will run the two marbles together. We have Vinegra as a doctrine which is binding on this Court—

The Court: No doubt about it.

Mr. Dowd: —and we have on December 4th, at least in the Law Journal, that the Supreme Court is taking it up; and we know, Judge, and I am repeating from what I said earlier, it is not a split decision in the Appellate Division, so they are taking it up on some merit, and maybe the Court is saying that Vinegra is not the doctrine maybe, Your Honor, and that Sarcone and the other two cases should not be—

The Court: Sarcone and Sibilia.

Mr. Dowd: Maybe they will tell the trial court and defense and prosecuting counsel how we run a format. What do we do procedurally here? Do I have to interrupt every question of the Prosecutor during the trial and become to appear as an obstructing person in the eyes of laymen who really don't understand what objections often are? Could you have a preliminary hearing, like a motion to suppress? And will you try the case and retry it? Do they have a right to put incriminating evidence on this cross examination? As Federal cases indicate, you can in the Miranda type (49) violation—

The Court: Well, do you recall at our conference not on the record, I suggested the utilization of the instrumentality, or the pretrial conference in the criminal case—yes, the State furnished me with the slip sheet. Now, your position as I understand it is, number one, anything that Mr. Portash may have said before the Grand Jury cannot be used against him for several reasons: Number one, the existence of the Public Employees Witness Immunity Act.

Mr. Dowd: Only so far as the State says it is applicable.

The Court: I don't follow you on that.

Mr. Brown: Nor do I.

Mr. Dowd: We don't contend that what he is accused of as—was a violation or a relation to that act, but the State says they are relying upon that act as forcing him to testify. I am capsulizing it, Judge, their reliance upon that act. They take its liabilities as well as its truths. They have acquired something. Therefore, if they are relying upon that act, and there is absolute immunity, I am relying upon the doctrine of a violation of my client's Fifth Amendment rights as a citizen who was compelled to testify against himself and the subsequent statements given thereafter.

(50) The Court: Well, I am missing your point. You are contending that your client occupies a dual status; number one, as a public employee or public official, number two, as a private citizen, separate and distinct from any office or status which he may occupy within the framework of public employment or public office?

Mr. Dowd: Correct. He doesn't become a second-class constitutional citizen by being a public official. He still has the Fifth Amendment right and all the other Bill of Rights rights.

The Court: Yes. He has the Fifth Amendment right, which I gather he chose not to exercise.

Mr. Dowd: He did exercise it.

Mr. Brown: I don't believe he did, Judge.

The Court: If he did—

Mr. Brown: He shouldn't have testified. He wouldn't have testified, if he did.

The Court: If he did, then I wouldn't be—

Mr. Dowd: Your Honor, you don't have before you the exhibits that we are going to introduce.

The Court: Well, I relied on what you submitted when you filed your brief.

Mr. Dowd: May I read—and may I have this marked as—I think I will have several of these (51) marked. Your Honor, I'd like to have marked for identification the testimony of the Grand Jury of November 6th. Mr. Portash—

The Court: Is that included in your—

Mr. Dowd: No, it is not. It is for a supplement of today's hearing, Judge.

The Court: This will be D-1 for identification.

(The testimony was received and marked D-1 for identification.)

Mr. Dowd: On the record, Your Honor, I did not submit these with my brief, Judge, for the reason I didn't know about the in camera impounding. D-2 for identification would be the transcript of testimony before the Grand Jury, the State Grand Jury, under the date of November 14, 1974.

(The testimony is received and marked D-2 for identification.)

Mr. Dowd: And further, statement of Joseph S. Portash, taken by Alfred J. Luciani, Esquire, Deputy Attorney General, on February 6, 1975, at the Monmouth County Courthouse, Freehold, New Jersey.

(The statement was received and marked D-3 for identification.)

The Court: Anything else to be marked, Mr. Dowd?

(52) Mr. Dowd: Not at this time, Your Honor. I first—In answer to your question, the hearing before Judge Schoch, which was the initial hearing of Mr. Portash's indoctrination into this matter—

The Court: This was the attempt to enforce the service of the subpoena duces tecum?

Mr. Dowd: It was a successful attempt. In that hearing, Your Honor, Mr. Luciani represented to Judge Schoch that Mr. Portash was a target of the investigation. Your Honor, at Page 11, Line 25 of our Exhibit 2, it says—the Court, which is Judge Schoch, said: "If he was directed to produce these"—Next page, 12—"documents after he has been advised that he is a target of the investigation, wouldn't he then be in a position if the indictment, if an indictment is returned against him, based on the production of these documents, wouldn't he be in a position to move to quash that indictment because they're using the fruits of this investigation with him as a target?"

The Court: That was pre-Vinegra, of course.

Mr. Dowd: Yes, Your Honor. And then, of course, my response and so forth.

Now, the reason I pointed to that, Judge, is that the State was placed on notice of the perils. What they did—Now, if I may have, Judge, what has been (53) marked

for identification as D-2—D-1, Your Honor—that after the hearing that, Your Honor, I just read from, Judge Schoch, before the Grand Jury, Mr. Portash did appear, and after being sworn: "Question: Mr. Portash, are you here pursuant to subpoena duces tecum, and have you presented documents because Judge Schoch has indicated you must do so; is that correct? Answer: Yes. I have a statement I'd like to read on behalf of that.

"Question: Go right ahead. Answer: Under order of Judge Schoch, I am ordered to appear at this proceeding after his denial of my claim that the information is privileged and may incriminate me. I understand I am the target of an investigation relating to possible criminal conduct in my capacity as Mayor of Manchester, and/or Ocean County—

"Question: I am going to ask you to identify material—"

Et cetera. Mr. Portash's position was that the documents incriminated him. He was ordered by a judge to produce them, not an automatic thing under the statute, but after a hearing before the judge, who said, I order you to produce these, and told the Attorney General: For telling me he is a target, he claims incrimination flows therefrom. You may (54) have a problem.

Now, that's pre-Vinegra. But there is a Fifth Amendment claim here, Judge. What Judge Schoch said in that testimony, Your Honor—and I can't put my finger on the exact portion of it yet—he does touch on the point, supposing a public official is asked to produce records or testimony not in relation to his public position, that the statute says in relation to the public position—Let's assume the dog warden of a community holds up a bank—

The Court: Excuse me. Isn't that in re Addonizio?

Mr. Dowd: In that area, Judge.

The Court: Wasn't he, although he was Mayor of Newark, required to produce his own personal tax returns or bank accounts, I believe? I think that's Addonzio, right on point, 53 N.J. at page 107, in re Addonizio. The syllabus reads: "Grand Jury was charged to investigate allegations of corruption in city government. The Superior Court, Law Division, entered order directing city Mayor to give obedience to subpoena of certain of his personal records and a second order denying motion by Mayor and his wife to set aside Grand Jury subpoenas served on bank and brokerage firm for production of accounts of Mayor and (55) his wife with them. On certification, the Supreme Court, Weintraub, C.J., held that claim of privilege of self-incrimination raised by city Mayor in regard to his personal records during investigation of official corruption in city, when Mayor was target of Grand Jury's investigation, was valid claim and privilege should be upheld.

Order directing Mayor to give obedience to subpoena directed toward his personal records reversed and order denying motion to set aside Grand Jury subpoenas served on bank and brokerage house for production of records of Mayor's accounts affirmed."

Now, I think this antedated the Public Employees Witness Immunity Statute. I'm not sure, but I recall that they did suppress it.

Mr. Dowd: I think as an outgrowth of that decision the statute was promulgated by the legislature.

The Court: Let me ask you a question.

Mr. Dowd: Judge, while we are right on target point, Page 24, Judge, of our Exhibit, in line 11, Judge, through Line 17, Judge Schoch in a colloquy with Mr. Luciani says: "I'm not quarreling with that statement, but what,

it sounded to me like what you're suggesting is that if these documents reveal Mr. Portash's involvement in some crime not related to his (56) office, that he will have immunity from that prosecution for that crime, and I don't think that's the effect of this statute."

The issue here, which I don't know how you can decide—

The Court: What documents were produced before the Grand Jury?

Mr. Dowd: Work records of a corporation for whom Mr. Portash was employed.

The Court: The Madison Agency, you are talking about?

Mr. Dowd: Yes. And they were incriminating, Judge, some of them, some of them.

The Court: Okay.

Mr. Dowd: Now, let's assume—

Mr. Brown: I think we should establish what records were produced by what witness before the Grand Jury. There were records of the Madison Agency produced by, I believe, more than Mr. Portash. Mr. Portash produced certain documents before the Grand Jury that were marked.

Mr. Dowd: You are not talking about duplicitious documents?

The Court: No. I think what Mr. Brown is saying is that the privilege would be delimited to what (57) Mr. Portash had disclosed, assuming the existence of a privilege. If someone else—

Mr. Dowd: I would like that—

The Court: That's what you are trying to say?

Mr. Brown: Yes. It was employment records and bank records and other bookkeeping records that were produced long before the State ever spoke to Mr. Portash.

Mr. Dowd: Let's say it came to pass, Judge, that a public official was subpoenaed to produce records or to give

testimony about something which was unrelated to his capacity as a public official.

The Court: Well, the statute is delimited in its terms, I believe the statute 2A:81-17.2a1: "It shall be the duty of every public employee to appear and testify upon matters directly related to the conduct of his office, position or employment before any court, grand jury or the State Commission of Investigation. Any public employee failing or refusing to so appear and to so testify shall be subject to removal from his office, position or employment."

Then 2A:81-17.2a2 says: "If any public employee testifies before any court, grand jury or the State Commission of Investigation, such testimony and (58) the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution for perjury committed while so testifying."

So actually what you are contending is not what you stated in your brief, but rather—well, I suppose you did cover it, but you covered it in a manner that didn't disclose to me—"The indictment should be dismissed"—and I am reading from Subparagraph B on Page 7—"as the Defendant's testimony before the Grand Jury is protected by the Fifth Amendment, and further, under N.J.S. 2A:81-17.2a2 it is also protected."

Mr. Dowd: Judge, you know—I may sound like I am toying with words, there is a very fine distinction, Judge. The State contends that the employment with Madison was related to payments to Mr. Portash, improper payments, for certain things in relation to his public employment. We say that's not true. This is a factual and elliptical disagreement. We say that the production of

documents, a portion of those produced, which is not before you yet, Judge—

The Court: No, and the Defendant's testimony.

Mr. Dowd: Well, it all comes from this, because we have the three sets of statements, one, two (59) and three marked. It is our contention they are totally unrelated.

The Court: You didn't tell me that in your brief.

Mr. Dowd: Well, that's why we say on the—Well, that's the frame of our position, Judge. We say the Fifth Amendment is applicable and the State, having indicted him by tying in Madison, Judge, under theory of prosecution, with public office, if their theory is correct, then 2A:81-17.2, et cetera, are applicable. We are saying there is no relationship, Judge. But if the State has indicted him for it, and takes the position there is a relationship, then not only is the Fifth Amendment that protects him, which he was forced to surrender for the acquisition of knowledge on their part, but also protection of the statutory mandate. Does that—do I articulate—

The Court: I understand what you are contending now. I was misled when I read your brief. You used the term "testimony". You never referred to exhibits.

Mr. Dowd: Well, the first Grand Jury, Judge, was exhibits and minor testimony.

The Court: Yes.

Mr. Dowd: And the next Grand Jury was Exhibit (60) 2 and the testimony taken at Monmouth County Courthouse, Exhibit 3. They all come from the poisonous seed that was sown on the subpoena duces tecum that he was forced to—

The Court: *Won Sung* v. *United States.*

Mr. Dowd: Right, Judge, and the fruits thereof.

The Court: What's the State's position?

Mr. Brown: Well—

The Court: I understand Mr. Dowd's argument now is, first, the statute does not apply because the statute delimits the testimony to duties relating to the office, that the statute further provides to appear and testify. Testify. Counsel, the way I gather it, his argument now is contending, first, he didn't testify, he was compelled to produce documents. These documents do not pertain to the duties of his office. He didn't want to produce them. He was aware that he was a target, he wanted to invoke the Fifth Amendment privilege against self-incrimination. He was compelled to bring them. Am I stating your position?

Mr. Dowd: Yes, and further ordered—

The Court: Yes. I said he was compelled to produce them.

Mr. Brown: I understand his position. I (61) don't understand the Court's question. I apologize.

The Court: With counsel's contention now, which has been clarified—and I didn't infer that from the brief—would that cause the State to change its position with respect to the State's opposition to this motion to dismiss the indictment, or in the alternative, to suppress?

Mr. Brown: Judge, the State has no intention, as I think was—

The Court: Are you relying—

Mr. Brown: —as was fairly set forth in our letter response, to elicit testimony about documents that Mr. Portash was forced to turn over to the State Grand Jury, or compelled to turn over to the State Grand Jury.

The Court: In other words, your representation is, you do not intend to use any such material—

Mr. Brown: —that came from Mr. Portash, that's correct, Your Honor. There was a position taken by Mr.

Luciani, before the hearing with Judge Schoch, that these documents that he was being asked to produce were not privileged documents. They were corporate records. I gleaned from the comments of the Court at that hearing that they may be corporate records, they may be business records of a corporation, but if you're (62) forcing him to produce them, you're running a risk that there is going to be a determination at some later time that these particular records can't be used against him. Now, we set forth in our position letter to the Court that Kastigar said we have to tell you what we are going to use, and in the letter we tell you what we are going to use. Items not set forth in the letter, as being what was in our possession prior to the contact with Mr. Portash, and items which are now a matter of public record, of the Board of Chosen Freeholders of Manchester Township Council or Manchester Municipal Utilities Authority, and items which were in our possession prior to any contact with Mr. Portash, may be used.

The Court: Well, I note in the bottom paragraph of Page 3, the paragraph which commences: April 17th, on April 17th and 24th, 1975; the testimony of Constance Kulpinski taken November 20, 1974, which would postdate the appearance of Mr. Portash before the Grand Jury when Judge Schoch had the hearing, exhibits pertaining to the above testimony, and matters of public record, such as minutes of—et cetera. When the letter says, "Exhibits pertaining to the above testimony," are there any exhibits there—

Mr. Brown: Not—

(63) The Court: —that would have been produced by Mr. Portash utilized later for the questioning of a witness?

Mr. Brown: No, Judge. Maybe I missed Mr. Dowd's

argument in his moving papers. We have made it perfectly clear, I think, to Mr. Dowd that we understand we can use no testimony from Mr. Portash on the State's case, and we can use no documents we obtained from Mr. Portash on the State's case. I came here today thinking that the problem might arise, and quite frankly, it would be a meticulous problem to handle, what we can use on cross examination of Mr. Portash. But as far as what we are going to put in on the State's case, we never had any intention of using either the testimony or any documents received from Mr. Portash, and we can document that the information from Constance Kulpinski was in existence a year before.

The Court: Well, what's your point, Mr. Dowd?

Mr. Dowd: The point? I think the indictment should be dismissed, number one— But we are beyond that.

The Court: I will make a ruling on that right now. I'm bound by the holding in Vinegra, which pronounces the law as pronounced by the Supreme Court in (64) the Blue case, which was decided in 1966. The Vinegra case specifically overruled *State* v. *Sarcone, State* v. *Roscania,* and *State* v. *Sibilia,* all of which held that the introduction of tainted evidence would warrant the dismissal of an indictment. Vinegra says no. Vinegra says it is merely a suppression remedy, that the evidence itself may not be used against the person against whom it was obtained in violation of his constitutional rights. I will take the State's recommendation that they don't intend to use any of that evidence in their case in chief. And as a consequence, how—and this is rhetorical—can the Court, within the framework of the holding of Vinegra, grant your motion to dismiss the indictment, Mr. Dowd?

Mr. Dowd: Your Honor, in the alternative, I would say Your Honor's bound by Vinegra.

The Court: I am bound by it. I have taken an oath.

Mr. Dowd: In the alternative, Your Honor, could you rule on our motion for a continuance of the case in view of the fact that on December 4th, which is not two weeks ago, the Supreme Court of New Jersey has decided that they will review Vinegra? And I think—to be risky and prophetic—a decision might be forthcoming in four to seven months, where the decision might (65) alter the course of what actions lawyers should take in trial courts. And I think it would be in the interest of justice, Judge, to see why they took the case up, what they have to say about it, see the applications, after much work, expense, time and effort, on everyone and all persons, are consumed. And I wonder, in view of that and in view of Your Honor's finding that you are controlled by Vinegra, whether the Court would consider carrying this matter until the Supreme Court rules on it, because it is, I think, the jugular vein of some of the major issues herein.

The Court: What's the State's position?

Mr. Brown: We would be opposed to a continuance.

Mr. Dowd: Assume the Supreme Court, Judge—excuse me, Mr. Brown—says: We reverse Vinegra, the remedy of dismissal? I don't know, none of us know, Judge, but we would be through with the trial.

The Court: Wouldn't your proper remedy be to apply to the Appellate Division for a stay? The trial court is bound by the law as it stands today; and the trial court, being the lowest of the low in the judicial hierarchy, has no right to postpone a trial of a case depending upon the outcome of the holding by a court of last resort. I would have to deny that stay, (66) but I most certainly would give you the right to go before the Appellate Division and ask for a stay. Trial courts are victims of calendars, Mr. Dowd. Appellate courts are not. But I have to recognize the law as it is, as it is as of now. I could not anticipate what a Supreme Court might do in Vinegra. The Appellate Division's decision is binding upon me at this particular point. And, as often happens, suppose the Supreme Court didn't act on it for a year, and turned around and affirmed Vinegra?

Mr. Dowd: I realize it is a complicated time of the history of this case, and the granting of a cert.—

The Court: Well, on the basis of the argument as advanced, I find that, under Point 3, the motion that the indictment should be dismissed must be denied by virtue of the present status of the law as pronounced by Vinegra.

Counsel is asking alternatively that a hearing should be held to determine what evidence is to be excluded at trial. Counsel has represented that nothing that was utilized by Mr. Portash in his testimony before the Grand Jury, either by way of oral testimony or exhibits, will in fact be introduced into evidence. That would apparently militate against the conduct of a (67) hearing. I would have to take counsel's representation that what he says he is going to do, he is going to do, which leaves—

Mr. Dowd: Your Honor, you denied the contractual argument, I assume?

The Court: Yes, sir. Yes, sir. The Court distinguishes the Santobello case completely from the situation here. The Santobello case involved a plea bargaining agreement after indictment between the prosecution and the defendant. When it came time for sentencing, the sentencing judge, who was not the judge who had participated in the plea bargaining arrangement, sentenced the defendant to a term of imprisonment which exceeded that which had been bargained for between the State and the defendant. The United States Supreme Court said that the trial

judge had no right to impose a sentence in excess of that which had been bargained for, that his alternative would be to impose the same sentence in order to enforce the plea bargaining arrangement, or to vacate the plea of guilty which was conditioned upon the plea bargaining arrangement and have the matter remanded for the purpose of trial. The Court cannot analogize this to plea bargaining, because in the first place, no indictment was ever in existence at the time these conversations took place. The Court (68) finds that the Prosecutor, although the Prosecutor—or the State, rather—although it may have represented that no indictment would be returned, that's a matter beyond the control of the State. The Grand Jury is an autonomous constitutional body that cannot be bound by any agreement between the State and the defense counsel. A Grand Jury, having the independent authority that it does have, most certainly could return an indictment. Then what the State might do after that point, is to move to dismiss the indictment, but that in no way is ever going to affect the validity or the authority, rather, of the Grand Jury, this independent autonomous body, to return an indictment in the first instance. The Court finds that the contract theory here is not analogous. There was no plea bargaining as such in this case. I am quite sure that counsel will agree with the Court's holding in that regard.

Mr. Brown: I would just make an inquiry. The Court is not making a factual determination on whether or not there was a promise, are you, Judge?

The Court: No. You don't need it.

Mr. Brown: Okay, Because I would—

The Court: In fact, I think there is a case right in point on that. The promise has fallen short of a plea bargaining. I will check it later.

(69) Suppose we take a five minute recess, gentlemen. I want to check that.

(A short recess was taken, after which the following occurred:)

The Court: Mr. Brown has raised the question as to whether or not the Court is going to make its determination with respect to the theory of the contract principle advanced by Mr. Dowd. The Court finds that there is no such thing here as an enforceable contract on the part of either party. This is not a situation where a plea has been entered. The contract—the Court knows of no theory of contract under the criminal law which can be enforced by the dismissal of an indictment. The Court has consulted the Standards Relating to the Administration of Criminal Justice, promulgated by the American Bar Association project on Standards for criminal justice. The only proceeding contained in that entire volume with respect to the contractual negotiations or arrangements between the State and Defendant is covered under Standards Relating to Receiving and Acting Upon the Plea, Part 3, Subparagraph 1, Propriety of Plea Discussions and Plea Agreements. The Court finds nothing in the Standards that would warrant the application of any type of contractual theory in the absence of a plea to (70) indictment; and so, accordingly, the Court finds that the contractual theory advanced by counsel was utilized in a plea bargaining case, namely the Santobello case. The Court knows of no other theory of law upon which an agreement by and between counsel can result in either the dismissal of an indictment or exclusion of evidence. The exclusion of evidence would not arise by reason of contract. The exclusion of evidence would arise by reason of the applicability of principles of law. You may comment on that for the record, Mr. Dowd, if you wish.

Mr. Dowd: Your Honor, assuming the Court does not accept the Santobello doctrine as applicable to this case, I think that Your Honor is aware that the cloak of your office gives you supervisory equitable control power over the administration of criminal justice. That is why we have decisions like Miranda and so forth. The prophylactic effect that the Court has is the power to interject into the method and means in which things come before the court. And I think D-1 is before the Court, which is a document of March 27, 1975, which is a specific offer—and I am using an "offer" in your Honor's decisional way.

The Court: Yes, sir.

Mr. Dowd: And if your Honor feels that this (71) is not a contract type matter, then in your supervisory inherent capacity in your office as a member of the judiciary, the inducement or seducement of Mr. Portash commencing back in the Exhibit 3—Exhibit 4, rather, Your Honor, and the following testimony of the following week, which is D-2, statement given the day Leisure Technology was indicted, and the other indictment, D-3, on the 5th of February, 1975, the acknowledgement by both Deputy Attorney Generals that they interviewed Mr. Portash as a witness potentially, coupled with the belated economic titillation by the State in D-1, resign a job and pay $23,322 (sic), or resign both jobs and pay $15,000, you are not indicated, it is the capacity—I am concluding, Judge—in your supervisory control over the fair, proper administration of criminal justice in the State of New Jersey, that it should be dismissed for those reasons.

The Court: Let me ask a question on that, Mr. Dowd. Are you seeking—and I am quite sure you are not—you ask the Court, in its inherent equitable powers, specifically, to enforce a contract between your client and the State?

Mr. Dowd: The effect would be the same, whether you excluded the indictment for reasons of enforcement, or if the State had no right to make such a (72) contract, or under your fact finding, Judge, to make such an offer, accepting even that then it was an improper inducement for my client to take a position which he did not have to.

The Court: But aren't you saying in effect that, by virtue of the discussions between the parties, a contract was arrived at in return for which the State would do A, and Mr. Portash would do B?

Mr. Dowd: That's correct.

The Court: Now, either you are stating that, by reason of the fact that the State added additional terms to that contract, that vitiated the contract and the contract is thereafter broken; or the other alternative, then, of course, you are dealing with the legal principle of a breach, or the State's additional terms was surplusage, they had no right to attempt to modify a contract accompanied by consideration. You are asking the Court to specifically enforce—excuse the split infinitive—to specifically enforce a contract between the State and the Defendant. Can you have it both ways, Mr. Dowd?

Mr. Dowd: What I am saying in the alternative, Judge, that—using any of the words which are all generic—breach, recision, reformation, expansion of a contract or a breach of a contract, assuming for the (73) sake of argument on the part of the State, leaves them whole and leaves us at a disadvantage; and when it leaves us at a disadvantage, my client is deprived of certain civil liberties that he need not have given up.

The Court: Isn't the only contract recognized in law, between the State and the Defendant, one which involves plea bargaining?

Mr. Dowd: Factually, under Santobello. That is the only case I know of, factually. But I don't think the doctrine would be limited to plea bargaining.

The Court: Well, you mentioned application of equitable principles. Of course, in construing contracts, equity always follows the law. You can't have it both ways. You can't sue for breach of contract, and you can't seek specifically to enforce a contract. They, of course, are inconsistent remedies. When you sue for breach, you deem the contract as gone. And I gather from your previous statement that, the minute the State stated that they wanted the Defendant to resign from the Pinelands Environmental Council, that a new term was added to the contract; ergo, a breach.

Mr. Dowd: A second term, yes sir.

The Court: Doesn't that vitiate the contract?

Mr. Dowd: But it doesn't extricate the accused from the position they had placed him in by the (74) initial contractual deal.

The Court: Aside from any evidential problems, is he any worse off now than he was before the discussions were entered into?

Mr. Dowd: He's indicted. If Your Honor is asking me, I can answer that after Your Honor rules on the Bill of Particulars and the use and the exclusionary rules Your Honor will have as to evidence in this trial, if Your Honor understands how I made that—

The Court: Yes, perfectly.

Well, the Court cannot see the application of any contractual principles here, because the Court finds that the sole case cited by counsel dealt with the tender of a plea, the acceptance of a plea and the breach thereafter by the State. That's the Santobello case. That's our Spinks case, which is in 66 N.J. And we have a new case, the citation

of which I don't have, where the State has the Defendant agree that he would not take an appeal. The Supreme Court decided that in the last two or three weeks—I am quite sure counsel is familiar with it—where the Supreme Court said, no, that's an unenforceable arrangement. I know of no other contracts between a State and Defendant, other than those concerning pleas, that the courts will take cognizance of for the purpose of determining a breach or (75) determining the enforceability.

Mr. Dowd: Your Honor, I respectfully disagree.

The Court: Can you show me one case, Mr. Dowd?

Mr. Dowd: If Your Honor's conclusion is that I can't have it both ways, I think in New Jersey we can plead in the alternative and, consistently, if one argument fails, the other doesn't. I may be in error there, but procedurally, I think I may.

The Court: But what you are saying, Mr. Dowd—And I am not talking about procedurally, alternatively or hypothetically or consistently or anything like that—either you contend that a contract is in existence—

Mr. Dowd: That we would contend.

The Court: —or you contend that a contract has been breached. Now, the minute a contract is breached, there is no contract. Then you are entitled to damages for the breach. Equity, regarding that is done which ought to be done, cannot conceive of the concept of a breached contract. There is no such thing in equity as a breached contract. Equity says: Perform, complete the contract. When you mention equitable principles, you are asking me to compell the State to perform a contract to which another term has been added, and which has been rejected by the Defendant.

(76) Mr. Dowd: I don't think you have the power to do that.

The Court: Of course not.

Mr. Dowd: I do say, Your Honor, where there is a breach—and I am using that word in an academic sense—that under the prophylactic effect of pronouncements like the Miranda doctrine, the doctrine, and other State doctrines where the Courts can keep some supervisory exclusionary control over the administration of criminal justice, where the Defendant is left in a lesser position than he was before the breach—and you have found something. I am not sure you found no contract or no enforceable contract—I'm not certain what Your Honor meant by that—or no authority to make a contract binding on a Grand Jury; that if these representations were made in good faith, they did not have the inherent power to make them to the detriment of the accused, and I think they should be prevented and estopped from going forward.

The Court: Then in the Santobello case, if you were to follow your argument, there should have been a motion to dismiss the indictment.

Mr. Dowd: I think so.

The Court: Vinegra says, where a man's Fifth Amendment rights are violated, there is no such thing as (77) a dismissal of an indictment. You are right back to suppression.

Mr. Dowd: Right. I realize, Your Honor, this may sound—and I'm not saying this apologetically—this may sound all not in tune with the law, but since the Supreme Court is taking Vinegra up, the record has to be preserved if it is turned over.

The Court: Of course.

Mr. Brown: Judge, I just would like to comment. I think part of Mr. Dowd's argument must fail, when he alleged that there was an agreement. Because if there was an agreement, there would have been no reason for the

State not to perform, or Mr. Portash not to perform. I think the problem arose because the agreement was never realized, and when it got to the point of formalizing an agreement, writing up alternatives to be either accepted or rejected, they were rejected. So there was never anything more than an offer. There was never an acceptance of an offer. What there was, there was not plea bargaining, but there was, at a pre-indictment stage, an attempt to make an offer that, in return for cooperation in this or other matters—

The Court: Call it a charge bargaining, as opposed to plea bargaining.

(78) Mr. Brown: —charge bargaining, but we never had an agreement; and if we never had an agreement, there is no necessity for—there can't be a performance.

The Court: It is an interesting theory of law, but I know of no case law that would support it. I know that Santobello and our own Spinks case did not warrant the dismissal of an indictment, using the Blue language, that drastic remedy. "Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."

Now, that's the United States Supreme Court, and when they had the Santobello case, all they had to say, applying the constitutional principles: We dismissed the indictment and we barred the further prosecution of this man. And they didn't do it. They sent it back, and what they said is: Vacate the plea or conform to the plea bargain.

Mr. Brown: One further point, Your Honor. When counsel states that this is done to the detriment of his client, I ask the Court to keep in mind that we (79) have represented—I don't think counsel contests it—that all of the evidence that was presented to the Grand Jury that indicted him was in existence prior to the contact with this Defendant, with the exception of Constance Kulpinski, which I think counsel will agree was one of the original causes for this investigation being started over a year before. So it's—I don't understand what injury counsel claims as a result of what he feels is the lack of performance of an agreement, because it was already documented at some time prior to contact with the Defendant.

The Court: When you are using the term "injury", I presume you are using the legal term, "detriment".

Mr. Brown: Yes. What injury is it, or detriment, to his defense?

The Court: Well, the Court finds the existence of no contractual arrangement here, a breach or violation of which, assuming that one would be found, would warrant the drastic remedy proposed by counsel, that the indictment be dismissed. If the Court's decision on that was unclear before, I just want to repronounce it; and the Court doesn't feel that Vinegra will have any effect on the Court's ruling here, because this does not involve a Vinegra situation here, this (80) alternative argument, namely, any "contract" which may have been developed subsequent to the witness' first appearing before the Grand Jury in November of 1974.

Mr. Dowd: Your Honor, I believe we have basically the main one left, the Bill of Particulars, which gives me great concern.

Mr. Brown: They were in separate moving papers.

The Court: Yes. I have them in the file here.

Okay. Let the record indicate that on June 3, 1975, what is entitled a Bill of Particulars was served upon the Attorney General, and the copy filed in the Superior Court jacket. The Court notes that the caption is possibly misleading, in that although it is called Notice of Motion and Demand for Bill of Particulars, counsel refers in the beginning to Rule 3:7-5. It would appear to the Court that much of the information desired here would fall in the category of Rule 3:12-2 et seq., which I believe counsel has made reference to during the course of the questions. The Court wants to point that out because there is an academic difference. The right to a Bill of Particulars is a right of constitutional dimension. It stems from the Sixth Amendment right to have the Defendant informed (81) of the nature of the charges against him. Rule 3:13-2 is a rule promulgated as a matter of grace by the Supreme Court, not a matter of constitutional rights, where the Supreme Court in its wisdom has found that disclosure of the adversary's case will tend to make trials more nearly a search for the truth. The Court finds no constitutional values involved in the enforcement of Rule 3:13-2. The Court has a feeling that if the Supreme Court wanted to repeal that rule at the next session, why, they most certainly could; and I am quite sure the Bill of Particulars would still be in existence. Now, Mr. Dowd, I invite you to say what you desire, sir.

Mr. Dowd: Thank you, Judge. Your Honor, we are in two areas. I will leave the exclusionary situation for a moment. Your Honor, I would like the Court to order the prosecution, as to Count One, to specifically spell out that portion of the indictment. I am going to the third line from the bottom of Page 1, Your Honor—the fourth, starting with: "Did willfully, knowingly and corruptly

engage in misconduct in his said public offices, that is, the said Joseph S. Portash did breach and violate his aforesaid duties by using the power and influence of is said public offices to obtain for Leisure Technology Corporation and its (82) affiliated and subsidiary corporations favorable treatment," et cetera. And it goes on, Judge. Judge, I cannot prepare before trial without knowing what this means. When did he corruptly do it,—I am leaving the adjectives out, Judge. They are all statutary words.

The Court: Yes, sir.

Mr. Dowd: —the misconduct in public office? What duties did he breach, insofar as what applications, from "Leisure Technology Corporation and its affiliated and subsidiary corporations favorable treatment for and favorable disposition of divers applications and proposals then pending and to be presented by the said Leisure Technology Corporation to the public agencies of which the said Joseph S. Portash was a member—."

Your Honor, Mr. Portash, during the period of time when the indictment was returned, was a Freeholder for the County of Ocean, Mayor of the Township of Manchester, and for a time, a member of the Manchester Public Utilities Commission. He was a pro forma member of the Planning Board of Manchester. Your Honor, I don't know who the subsidiaries or affiliates are with Leisure Technology. That's number one. I don't know who they are referring to. Number two, I don't know what "divers applications" encompasses. They refer to "public agencies of which Mr. Portash was a member". (83) What are agencies?

The Court: Are you asking what are agencies, or what—

Mr. Dowd: What do they mean?

The Court: —or what agencies are referred to in the indictment?

Mr. Dowd: That's right, Your Honor. What applications were referred to? I have been advised, Your Honor —I can't represent this factually—but I have been advised that there may be thousands of divers applications and proposals. Now, we may eliminate certain things that are not considered by the prosecution to be applications and proposals, but I would like to know where, when and by whom, Mr. Portash acted on certain things, or anticipatedly would act on certain things.

The Court: Mr. Brown.

Mr. Brown: Judge, as I think we started to discuss this morning, when Mr. Luciani was present, we are speaking of applications of Leisure Technology Corporation and its subsidiaries, such as Leisure Village, Leisure Knoll, subsidiaries wholly owned by Leisure Technology Corporation, who had applications pending before the Board of Chosen Freeholders of the County of Ocean, the County of—the Township of (84) Manchester, and the Manchester Public Utilities Commission. And those applications, which in Mr. Luciani's letter he refers to, are matters of public record, and the matters of public record of the actions of the Board of Chosen Freeholders, of the Council of Manchester, and the minutes of the minutes of the Manchester Public—the Manchester Municipal Utilities Authority, where Mr. Portash voted favorably during the period of time that he was on the payroll of the Madison Agency, a subsidiary of—at least partial subsidiary—of Leisure Technology, Inc.

The Court: Are you contending that every application made to any one of the agencies in which Mr. Portash ostensibly had a voice, and which emanated from either Leisure Technology or any of its subsidiaries, constituted one of the acts referred to in the first count?

Mr. Brown: Yes, sir.

The Court: Now, what would be the probability of double jeopardy here?

Mr. Brown: I think, Judge—

The Court: Suppose you prove that, and Mr. Portash is tried, and the case is disposed of, and then a week later, an indictment couched in identical terms culls fifteen more and then twenty-five more and then (85) fourteen more? Now, you have embraced a time period here between the first day of July 1971, and on or about the 12th day of December, 1972.

Mr. Brown: I think that Mr. Portash would be protected on the disposition of Count One of the indictment against any subsequent charge of misconduct arising out of his voting in favor of applications of Leisure Technology, Inc. and its subsidiaries to the Board of Freeholders, to Manchester Township, and to the Manchester Municipal Utilities Authority.

The Court: All right, now. Assume that one of the things you intend to prove is an occurrence, we'll say, that took place on May 31, 1972. Mr. Portash at that time was out of the country.

Mr. Brown: I think first, Judge, that we would be bound by the time period of the indictment. I think also—

The Court: All right. Now suppose he says: I was out of the country or out of the state fifteen times, or I missed twenty-four meetings during this period of time. I want to know at which meetings you contend these incidents took place.

Mr. Brown: I would say the meetings—The testimony we are going to offer, through the Clerk of the Board of Chosen Freeholders, the Clerk of the (86) Township of Manchester, and the Clerk of the Municipal Utilities

Authority, will be meetings where Mr. Portash was present, or spoke on a particular application, or voted on a particular application.

The Court: Mr. Dowd says: Tell me about them.

Mr. Brown: I'll make those minutes available to him, Judge. What he is looking for, he is looking for me to take discovery and catalog discovery for him. That's what he is looking for.

Mr. Dowd: That's exactly—

Mr. Brown: I don't think the Bill of Particulars can be used—

The Court: I am treating this as a hybrid combination, as I say, of a Bill of Particulars and request for discovery.

Mr. Brown: I also think we should approach it—Judge, there's been no—

The Court: I will say this, counsel: You should have broken it down.

Mr. Dowd: I will—

The Court: You should not have combined proceedings under Rule 3:13 with proceedings under 3:7-5, because the Court is required at that point to apply different principles of law. One goes to the constitutional requirements, the other goes to the crux (87) of the discovery rules.

Mr. Dowd: I think in this particular case, Judge, by way of response to that, the applications—the physical applications, Your Honor, and I assume this is what we are talking about—and the alleged acts on the applications, are Siamese twins. They are indistinguishable in this particular set of circumstances. Your Honor, there is a practical suggestion here, that flows through my mind, to resolve this. There will be a trial, I assume. Mr. Brown or Mr. Luciani as the trial counsel will present, I assume, to the Jury, through a competent witness, certain appli-

signed or what. I really don't know why that is there but I know that Mrs. Herring was unavailable last night for trial for the purpose of bringing the records in because of her flu and the possible complications.

Mr. Brown: I would object to it for that reason.

The Court: Well, Counsel has withdrawn it.

Mr. Brown: Fine, we don't have any problem.

The Court: Anything further, gentlemen?

Mr. Wilbert: Yes, your Honor. Your Honor, my client wishes to take the stand, however, I am in a position that I can't advise him to take the stand because I believe that the Court's ruling will require an extreme burden not only on the Court but (82) also, I believe that it requires an extreme burden on his Sixth Amendment right to take the stand, that he is going to have this evidence utilized against him improperly not only over the representations of the Deputy Attorney General that they would not be, not only over the representation of the Statute and the plain meaning of the Statute that they would not be but over the Court's own ruling earlier that I believe that the Court in clarification has really, in effect, prevented my client from exercising his right to the Sixth Amendment and so I will not counsel my client to take the stand, in fact, I have counseled him not to take the stand because of the Court's ruling.

The Court: All right. The Court wants to clarify one thing. The Court's ruling in no way has prevented your client from taking the stand. What the Court has done when confronted with an evidence problem has examined all the applicable case law that it could find, all the statutes, all the rules of evidence and the Court has made a pronouncement which the Court considers in its judicial wisdom to be (83) compatible with every holding by a court

of last resort in this state. The Court's oath requires that it be bound by the controlling law of the State of New Jersey so if a peripheral consequence of the Court's ruling is that an application be made by you in your tactical defense not to have your client take the stand, I can't see how in any way that can be construed as constituting a ruling by this Court preventing your client from taking the stand. That was the language you used, Mr. Wilbert. Of course, the Court finds it to be at variance with the Court's application of what the Court considers to be the authoritarian law with respect to the peculiar factual situation disclosed here. So if the record represents that the Court has prevented your client from taking the stand, the Court most certainly on the record wants to disabuse that notion upon the record.

Mr. Wilbert: The only issue I would take with that, your Honor, is that I believe the Court made no mention, of course, of the case and the only case that is exactly on (84) point in this instance and that is the *Hockenberry* case, a case from the highest court in the land. I believe while federal rules are persuasive and not binding, federal rules become more persuasive when there is a lack of other cases in the jurisdiction in the State of New Jersey. In New Jersey I would argue not only is there not a case exactly on point, I would argue on the contrary. There is case law which indicates the rule to be applied is the *Hockenberry* rule which is found in *Vinegra*, citing *Kenny* as the controlling case with regard to the use of immunity and—

The Court: Well, Mr. Wilbert, you're arguing the Court's construction of the law.

Mr. Wilbert: I am, I most respectfully submit that I am. I don't mean to lightly argue that but I feel in my

client's interest I am compelled to argue against the Court's ruling and I have.

The Court: Anything further?

Mr. Brown: Just this, Judge, on the point of clarification what I attempted to bring out to the Court under *State* v. *Boncelet* (85) is the scope of my cross examination. I think the discussion of last Thursday resulted in certain conditions being set by the Court. I think the discussion of today was an attempt, a suggestion by Mr. Wilbert that if he limit his client's direct examination, then I should be precluded from cross examining his client on everything that has been presented to this jury in the case in chief which I would strongly object to do, to the Court instructing me to do so.

The Court: Well, not to interrupt, the Court has made no such pronouncement. I believe the Court has pronounced what it considers to be the law regarding scope and extent of cross examination of a party defendant. You may continue.

Mr. Brown: I have nothing further.

The Court: All right. The Court is concerned with Mr. Wilbert's pronouncement that I have prevented his client from doing anything, nothing could be further from the truth, Mr. Wilbert.

Mr. Wilbert: Your Honor, I don't mean that you intentionally, I don't mean that you (86) in an adversary way did any such thing, I certainly would not even suggest that to the Court. But I believe that the effect of the Court's ruling, whether it was done—and I submit it was done because of your reading of the applicable case law and I don't in any way argue why you made your ruling; I argue, your Honor, that the effect of it is to prevent my client from taking the stand because I cannot

foresee how the Court has, your Honor has, in your own terms indicated what an impossible burden it is to seek question after question clarification that would of necessity prolong this trial possibly two, possibly three weeks because of the nature of the extensive grand jury testimony and because as we now have the representation of Counsel that he wishes to cross examine and I only must argue that he has to imply thereby that he's going to be permitted or going to seek permission to enter into the areas of grand jury testimony. It's immunized and I would strongly argue that that is an impossible burden and, of course, the burden is my Sixth Amendment rights, (87) my client's Sixth Amendment rights which are also impossible to evaluate. I sincerely believe that I will stay free of any cross examination questions with regard to that grand jury testimony and then to subject him to a question by question Court determination of what is inconsistent, what is consistent and what areas may be invaded as to his grand jury testimony, as to the cross examination so I can't make—

The Court: Well, Mr. Wilbert, on the basis of the Court's ruling, you are making a tactical election.

Mr. Wilbert: I don't believe it's that. I don't believe it's a merely tactical election, I think it's foreseeing that my client's rights as given to him by the Statute and as given to him by Mr. Luciani's own words will not and cannot in the Court's opinion be given effect and, therefore, he cannot exercise his Sixth Amendment rights to take the stand.

Mr. Brown: Judge, I hesitated to respond before because I thought the Court made it very clear. The position of the State is (88) that Mr. Wilbert consulting with

his client, Mr. Portash, may elect to testify, may elect not to testify, that is a privilege of Constitutional proportions which only Mr. Portash in consulting with his attorney can arrive at because of the factual history of this case. Mr. Wilbert has brought to the attention of the Court certain areas that he felt should not be allowed in this trial on cross examination. I'm not going to go into them because I think the record is complete on the arguments advanced by Mr. Luciani and by Mr. Wilbert as to what the State should be allowed to use on cross examination. The Court, out of the consideration of Counsel, both prosecution and defense, has expended probably four or five hours in chambers listening to argument and making not an advanced determination but indicating to the prosecution and the defense what the Court understands the existing law to be. I'm prepared to proceed under that existing law. The fact that this examination of a defendant might take a week, two weeks or three weeks is of no moment at this time when we are deciding (89) the defendant's Constitutional right to testify or not to testify. The State is ready, willing and able. In fact, it was my suggestion if the Court recalls that when I got to that point in cross examination where I was going to cross examine the defendant on what I felt was an inconsistent statement before making reference to the inconsistent statement I would approach side bar and so advise the Court so the Court could make a determination. So I don't think that this record should in any way indicate that the Court has precluded this defendant from testifying or that the State has precluded this defendant from testifying. The Court has given us the benefit of your review, your wisdom, your determination based on extensive arguments by prosecution and defense. We

stand ready, willing and able to proceed and we will proceed whichever way the Court directs us and for as long as it takes but there is absolutely nothing in the Court's suggestion to both counsel of what the Court feels is an interpretation of the existing law which prohibits (90) Mr. Portash in any way from taking the stand.

Mr. Wilbert: Your Honor, I feel compelled to respond to that if I'm permitted and just to the extent that, and I will ask a rhetorical question, of course, and I don't expect Mr. Brown to answer or he may. What, indeed, was the entire purpose of conducting an investigation, having certain evidence that the Prosecutor must now feel at least is worthy of a prima facie case in which the Court has placed its imprimatur on because of the motions at the end of the State's case, then bringing a man before a court of law, granting him immunity and advising him defacto, also, that they would not use that testimony in any way against him and they now sit here at the crucial moment in the case when Mr. Portash wishes to take the stand and advise to the Court that they are intending to use any inconsistencies in the grand jury testimony to examine him in cross examination in this case?

The Court: Well, you're going right back to the legal arguments previously advanced upon which the Court made the ruling (91) and the Court wants to point out that the Court's suggested to Counsel that before the question be posed, if it be considered to be improperly inconsistent, if the Court would make a ruling at side bar to foreclose anyone from being put in the anomalous position but, Mr. Wilbert, your argument is directed to the postulate that the Court, by its ruling, is preventing your client from testifying. Now, Mr. Wilbert, once again, nothing could be further from the truth.

Excerpts from Transcript of Proceedings of February 9, 1976

Mr. Wilbert: Then if you, as a matter of housekeeping, will entertain question by question and as Mr. Brown just stated, whether this takes three weeks is of no moment in the comparing Constitutional rights, I would request that the Court conduct this prior to direct testimony so that we may have a ruling.

The Court: No, Mr. Wilbert. What you're asking the Court for is plenary, evidential rulings in advance which the Court, even if it were inclined to do, is not permitted. There is no such thing as a dry run in a criminal case. My suggestion that they be disclosed at side bar is a suggestion, nothing (92) more, because I have no power to foreclose in advance Counsel who is in charge of his case to pose a question which he feels is relevant and competent, the remedy as we know is the objection and the ruling thereon.

Mr. Wilbert: I submit you do, your Honor, only on the basis of a Rule 8 hearing and that a Rule 8 hearing as to admissibility of evidence is certainly cognizable by this Court and is engaged in many instances—

The Court: Mr. Wilbert, you're not asking for a Rule 8 hearing, you're asking for the Court to rule upon the propriety upon every question which Counsel may choose to ask.

Mr. Wilbert: Which your Honor will ultimately do. If we do it at side bar—

The Court: Mr. Wilbert, isn't that the same situation whenever witnesses take the stand?

Mr. Wilbert: No, your Honor, there are questions I believe that come up during testimony that may call for an objection and a ruling but not asking about the admissibility of evidence as we are here. This entire (93) testimony is based upon admissibility—

Excerpts from Transcript of Proceedings of February 9, 1976

The Court: We're flogging a dead horse here. You represented to me you intended to ask no inconsistent questions.

Mr. Wilbert: That's right.

The Court: Then I will be called upon to determine whether or not a question, if posed, would elicit an answer inconsistent with the witness' grand jury testimony provided it is otherwise relevant and that's what I thought was clarified but to convert that into a ruling by the Court that will prevent your client from testifying is beyond my judicial comprehension, I can't understand that.

Mr. Wilbert: Your Honor, possibly I have misunderstood the Court's ruling but as your Honor just said, how can I protect my client from the use of grand jury testimony if your Honor is going to rule whether the cross examination question that is posed by Mr. Brown, whether it may call for an inconsistent answer than that given in the grand jury, that affords me absolutely no protection whatsoever and the immunization and the testimony derived (94) therefrom is a nullity.

The Court: I thought you agreed upon that with Mr. Brown before lunch.

Mr. Wilbert: I didn't agree that he could ask those questions.

The Court: You most certainly represented to me that your area of direct examination would not disclose the existence of any inconsistencies.

Mr. Wilbert: Exactly and I said, your Honor, if I did enter an area that was inconsistent on direct, then perhaps under your Honor's ruling it could be used at all, it would be ripe as to cross examination as to an inconsistency. How can that lead to the proposition that Mr. Brown may open up inconsistencies by asking questions on cross examination?

Excerpts from Transcript of Proceedings of February 9, 1976

The Court: Mr. Wilbert, I've devoted more time to this case in chambers to enlighten Counsel with respect to evidence rulings and proposed actions that the Court might take to a greater extent than any case I have ever tried among the hundreds of which I have tried. I realize the seriousness of this case, the (95) delicacy of the proceeding and I have bent over backwards not only to have Counsel postulate a theory and have the Court make a ruling but I have given Counsel carte blanche in placing their position on the record so in the event of an adverse ruling to your client by this jury the Appellate Division is going to be completely enlightened as to the reasons for the Court's ruling. Now, under *Abbott* I'm only required to do one thing: Listen to the question, entertain the objection, if the objection is that the question can't be asked as *Abbott* says, Counsel has placed his position on the record, he is protected. If the question is objected to and Counsel wants to place an offer of proof on the record he may do so at side bar out of the hearing of the jury. Very early in the case I called to Counsel's attention the *Abbott* case and the implementing Court Rule but I've spent so much time in my chambers making these advisory rulings, which is what they are, that I feel that I am bending over backwards to enlighten Counsel when I should be out on the bench disposing of this (96) case. Because of the serious nature of it, because of your client's position in the community and the like I have given far more time to in chambers rulings than I have ever done in any case I have ever tried from first degree murder on down. Now, I have made my ruling, Mr. Wilbert. You may advise your client and if your client intends to go against your wishes, I will personally question your client to be sure that your client

Excerpts from Transcript of Proceedings of February 9, 1976

understands what may take place and I believe I have that right, Counsel.

Mr. Brown: I think you almost have a duty to put it on the record, the client's decision.

The Court: Yes, the client's decision, not the attorney's.

Mr. Brown: Yes, I would request that it be done.

Mr. Wilbert: Well, your Honor, I have advised him not to stand the stand. If he wishes to do so, if you will—if you care to speak to him about it, I have no objection.

The Court: No, it's usually in the reverse situation where the attorney advises the (97) client to take the stand and the client doesn't take the stand, then in the event of the appeal where the client says I wanted to take the stand but my lawyer didn't—wouldn't let me, that questioning there is to clarify it. I'll take your representation that the determination is your client's, Mr. Wilbert, and we'll proceed from there.

Mr. Wilbert: I believe it is at this point, he's here in the room and—

The Court: Well, I want the record to show that Mr. Portash has been present at most of the evidentiary rulings that the Court has made in chambers. You're representing to the Court now that a decision is going to be made by your client, you have advised him not to testify and the decision is his.

Mr. Wilbert: The decision is his.

The Court: All right, anything further?

Mr. Brown: No, sir.

(End of discussion in camera.)

(Whereupon a recess is taken.)